(25,103)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 820.

CLARK PEASE, PETITIONER,

vs.

RATHBUN-JONES ENGINEERING COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, begun on the first Monday in November, A. D. 1915, before the Honorable Don A. Pardee and the Honorable Richard W. Walker, Circuit Judges, and the Honorable Emory Speer, District Judge.

CLARK PEASE, Appellant,
versus
RATHBUN-JONES ENGINEERING COMPANY, Appellee.

Be it remembered, that heretofore, to-wit, on the 14th day of July, A. D. 1915, a transcript of the record of the above styled cause, pursuant to an appeal from the District Court of the United States for the Southern District of Texas, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2804, as follows:

(a)

UNITED STATES

CIRCUIT COURT OF APPEALS

FIFTH CIRCUIT.

No. 2804

CLARK PEASE,

Appellant,

versus

THE RATHBUN-JONES ENGINEERING COMPANY,

Appellee.

Appeal from the District Court of the United States for the Southern District of Texas.

(ORIGINAL RECORD FILED JULY 24, 1915.)

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION.

RATHBUN JONES ENGINEERING CO.

versus No. 5 Equity.

PEOPLES LIGHT CO.

Appellant's Praecipe.

On appeal of Clark Pease from Order of February 24, 1915.

Mr. L. C. Masterson, Clerk,
Corpus Christi, Texas.

Dear Sir:

You will please include in the Transcript on appeal herein, the following:

1. Caption showing the entry of the order of February 24, 1915, in vacation.

2. Style of the case.

2a. Proof of service of praecipe.

3. The original bill of complaint filed by Rathbun-Jones Engineering Co., upon which the original trial was had.

4. The Original decree of January 9, 1914.

5. Petition for appeal from said decree, dated March 19, 1914, and order allowing same.

6. Appeal bond, filed March 9, 1914, signed by Clark Pease and Gust Heye, as sureties.

7. Mandate of the Circuit Court of Appeals, filed herein January 20, 1915.

8. Order on mandate of February 24, 1915.

9. Order of sale of Machinery dated March 8, 1915, and the marshal's return thereon.

10. Order of the County Court of Nueces County, Texas, appointing Elenita S. Heye, administratrix of the estate of Gust Heye, deceased, dated August
4 4, 1914. This is attached to the motion of Clark Pease and Elenita S. Heye, administratrix, filed May 6, 1915.

11. Oath and Bond of Elenita S. Heye, administratrix, and order approving bond. This is attached to the motion of Clark Pease and Elenita S. Heye, administratrix, filed May 6, 1915.

12. Articles of Dissolution of the Peoples Light Co. This is attached to the Motion of Clark Pease and Elenita S. Heye, administratrix, filed May 6, 1915.

13. Petition for an appeal by Clark Pease, addressed to Hon. Richard W. Walker, United States Circuit Judge.

14. Order allowing said appeal, and fixing bond.

15. Appeal Bond.

16. Assignments of Error by Clark Pease.

17. Citation on appeal and return thereon.

You will please prepare the transcript, as required by the rules and file the same at New Orleans, La., not later than the 6th day of July, 1915.

FRANK H. BOOTH,
Attorney for Clark Pease.

San Antonio, Texas, June 10, 1915.

Indorsed: Praecipe of Clark Pease, on appeal from order of February 24, 1915. Filed 12 day of June, 1915.

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5 CAPTION.

In the District Court of the United States for the Southern District of Texas, Corpus Christi Division.

In Vacation, February 25th, A. D. 1915.

The Rathbun-Jones Engineering Company, Complainant
vs. No. 5, In Equity
Peoples Light Company, Defendant.

Proof of Service of Praecipe.

June 10, 1915.

Messrs. Terrell, Walthall & Terrell,
San Antonio, Texas.

Gentlemen:

I beg to advise you that Honorable Richard W. Walker, United States Circuit Judge, has allowed the petition of Clark Pease for an appeal from the order entered in Rathbun-Jones Co. vs. Peoples Light Co., No. 5, Equity, fixed and approved the bond on appeal, and that said petition, order of allowance, bond and assignments of error have this day been forwarded to the Clerk at Corpus Christi, Texas.

I have also filed with said Clerk, a praecipe indicating the portions of the record to be incorporated in the transcript on this appeal, and enclose herewith a copy thereof as required by the Rules of Court.

Yours truly,
FRANK H. BOOTH,

I, Frank H. Booth, counsel for Clark Pease, do solemnly swear that on the 10th day of June, 1915, I delivered to Terrell, Walthall & Terrell, at San Antonio, Texas, a true and correct copy of the foregoing letter, together with a true copy of the praecipe therein referred to.

FRANK F. BOOTH.

Sworn to and subscribed before me, this June 10, 1915.

JOSEPHINE SHULTS,
Notary Public, Bexar County, Texas.

(Seal)

Indorsed: Proof of Praecipe. Filed 12 day of June, 1915.

ORIGINAL BILL OF COMPLAINT.

To the Judges of the United States District Court for the Southern District of Texas, Laredo Division.

The Rathbun-Jones Engineering Company, a corporation, and a citizen of the State of Ohio, brings this its bill against the Peoples Light Company, a corporation and citizen of the State of Texas. And thereupon the plaintiff complains and says that:

I.

The plaintiff, the Rathbun-Jones Engineering Company, is a corporation created and existing under the laws of the State of Ohio, and is a citizen of said State, having its principal office and place of business at the City of Toledo in said State of Ohio.

The defendant, the Peoples Light Company, is a corporation created and existing under the laws of the State of Texas, and is a citizen of said State, having its principal office at the City of Corpus Christi in the County of Nueces, State of Texas, and within the jurisdiction of this Court, and that George Von Blucher is president of said

defendant company, and resides in the City of Corpus Christi, upon whom the process of subpoena against defendant upon this bill may be served.

II.

The plaintiff avers and represents unto the Court that, on or about August 9th, A. D. 1909, it made and entered into a written contract with the defendant, a copy of which is hereto annexed and marked "Exhibit A" and made a part of this bill, in and by which the plaintiff agreed to furnish and sell and deliver to the defendant certain machinery, including an engine, producer, apparatus, and equipment for a light plant to be erected and operated by the defendant at said City of Corpus Christi, for
7 which the defendant agreed to pay to the plaintiff the sum of ($14,000.00) fourteen thousand dollars. The various and sundry items of said plant, machinery, apparatus, and equipment are specified in said contract, Exhibit A, to which reference is made for a full description of same. (The Plaintiff also agreed to furnish the defendant foundation plans for said light plant suitable for reliable soil, without charge to the defendant; and the defendant agreed and undertook to place said plant and machinery in accordance with the plans so furnished by the plaintiff; and the plaintiff bound itself to be responsible for the accuracy of the plan, but not for the placing of such plan, nor for any defect arising from the character of the soil or the material or workmanship connected with the foundation.

It was agreed and stipulated by the plaintiff and the defendant in said contract that the plaintiff should have a lien upon all of the machinery, apparatus, equipment and property specified in and furnished and sold and delivered to the defendant under said contract to secure the payment of the purchase price thereof, and said contract created a lien upon all of said machinery, appurtenances, equipment and property so furnished and sold and delivered by the plaintiff to the defendant for said Light plant, and said contract was duly filed by the plaintiff

on the 12th day of June, A. D. 1911, with the County Clerk of said Nueces County, in accordance with the Statutes of the State of Texas in such cases made and provided, and the plaintiff now has a valid and subsisting first lien upon the whole of said light plant to secure the payment of the balance due the plaintiff on account of said sale and purchase hereinafter stated.

The said light plant, machinery, equipment and property was installed and is now located and being operated by the defendant on Lots Nos. Two (2), three (3), four (4), and five (5), in Water Block No. three (3), on the Beach portion of the City of Corpus Christi, in said Nueces County, Texas, and within the jurisdiction of this Court.

8

III.

The plaintiff avers and represents unto the Court that the defendant is now indebted to it on account of said sale and purchase of said light plant, machinery, apparatus, equipment and property under said contract in the sum of five thousand, three hundred and sixty (5,360.35) and 35/100 dollars balance, with interest at the rate of six per cent (6%) per annum from the 1st day of April, 1911, down to the present time, and is also indebted to the plaintiff in the further sum of two hundred and sixteen ($216.79) and 79/100 dollars with legal interest for extras furnished by plaintiff to defendant at its request for said light plant, making the principal sum now due plaintiff by the defendant on said account, five thousand five hundred and sixty-seven ($5,567.34) and 34/100 dollars, which, with interest is long past due and unpaid, and which the defendant has failed and refused and still fails and refuses to pay, though often thereunto requested.

IV.

The plaintiff avers and represents unto the Court that it has fully and faithfully complied with and executed and performed all the promises, undertakings and stipulations in said contract assumed by and imposed upon it, and has

furnished and sold and delivered to the defendant all of said plant, machinery, apparatus, equipment and property in said contract specified, and which has been accepted by the defendant and placed by it upon the lots in Corpus Christi above stated, and is now being and has been for more than two years, operated by the defendant.

V.

The defendant pretends that the plant, machinery, apparatus, equipment and property furnished and sold and delivered to the defendant by the plaintiff is not in all respects in conformity to said contract; but the plaintiff avers the fact in this regard to be that one of the items of machinery to be furnished by the plaintiff to the defendant under said contract was a No. Seven (7) Producer, which this plaintiff did furnish and deliver to the defendant, and which Producer is in all respects in compliance with its undertaking and promise in the said contract, and fully capable and sufficient to perform the work, service and use for which it was intended, as provided in said contract, but, on account of the improper operation of the same by the defendant, the same was claimed by the defendant to be not sufficient
9 and not in compliance with the contract, which claim of the defendant is untrue.

But the plaintiff, not conceding the claim of the defendant, in order to deal liberally with the defendant proceeded to and did furnish to the defendant and install a No. Eight (8) Producer, which was largely in excess of the capacity and value of the producer which plaintiff by its contract had agreed to furnish, and the defendant accepted said producer No. Eight (8), and has ever since been using the same in the operation of its said light plant, and promised to pay the plaintiff the balance due aforesaid upon its said contract, but which balance the defendant has failed and refused to pay, as above set out.

The said Producer No. Eight (8) is now in the possession of defendant and being operated as a part of its plant upon

said lots above specified in the City of Corpus Christi, Nueces County, Texas, and is subject to the lien of plaintiff, as aforesaid.

VI.

To the end, therefore, that the said defendant may, if it can, show why plaintiff should not have the relief hereby prayed for, and may under its corporate seal, authorized by its duly constituted board of directors, and according to the best and utmost of its knowledge, rememberance, information and belief, full, true, direct and perfect answer make, to the several interrogatories hereinafter numbered and set forth, as by the note hereunder written, it is required to answer; that is to say—

1. Whether it executed the contract, Exhibit A. hereto annexed, and whether said exhibit is a true copy of said contract?

2. Whether said contract was filed with the Clerk of the County Court of Nueces County, and the date of the filing thereof?

3. Whether plaintiff furnished and delivered to defendant the light plant, machinery, apparatus, equipment and property in said contract mentioned, and said extras, and to state specifically, item by item, what machinery, apparatus, equipment, articles and property were and have been furnished by plaintiff to defendant for its said light plant, and the date thereof?

4. Whether plaintiff furnished to defendant said producer No. 8, and whether same was installed upon defendant's premises and when, as a part of its plant, and whether the same has been and is now in use by the defendant in the operation of its plant?

5. Whether said plant, machinery, apparatus, equipment and property are now in the possession of defendant upon its premises, or elsewhere in the City of Corpus

Christi, or in Nueces County, or within the jurisdiction of this Court, specifying, item by item, all of said property and where each and every item thereof is now situated?

6. Whether defendant is now operating its light plant with the machinery, apparatus, equipment and property furnished to it by the plaintiff, and how long it has been so operating same;

And the plaintiff prays that the defendant may, under its corporate seal as aforesaid, full answer make to all and singular the averments of this bill, fully and particularly, as though the same were repeated, and it specially interrogated, paragraph by paragraph, with sums, dates, and attendant circumstances and incidental transactions.

VII.

In consideration of the premises, and inasmuch as the plaintiff is without adequate remedy at law, and can obtain the relief to which it is entitled in this Honorable Court of equity, it prays that upon a final hearing of this cause, the plaintiff may have a pecuniary decree against the defendant for five thousand three hundred and fifty ($5350.35) and 55/100 dollars, the balance due under said contract, and two hundred and sixteen ($216.79) and 79/100 dollars for extras furnished, as aforesaid together with interest and costs of suit, and that the same be declared a lien upon all of the aforesaid property of the light plant of the defendant, and that said lien be foreclosed, and that said property be decreed to be sold for the payment of said debt, interest and costs, and that a special master of this Court be appointed to make such sale, and that such sale be made in accordance with the rules and practice of this Court and the Federal Statutes in such cases made and provided, and that the proceeds of sale be applied to the payment of said debt,

11 principal, interest and costs, and that a writ of distringas be issued to place the purchaser of said property in possession thereof, and that if the sale of said property shall not produce a sufficient amount to pay

said debt, principal, interest and costs, the plaintiff have its writ of fieri facias for the balance, to be levied of the goods and chattels, lands and tenements of the defendant.

And the plaintiff prays for further or different and general relief, such as the facts of this case when developed by the evidence in the cause shall entitle it to have and receive.

And the plaintiff prays that if, during the progress of this cause, it shall become necessary for the protection of plaintiff's rights in the premises, a writ of injunction may issue against the defendant, restraining it from in any manner impairing the lien of the plaintiff upon said property, or that a receiver may be appointed to take possession of said plant and property, to preserve, hold, manage, and operate the same.

The plaintiff prays for the most gracious writ of subpoena to be issued out of this Court, directed to and served upon the defendant, Peoples Light Company, requiring it to appear on a day named, to answer the exigencies of this bill.

TERRELL & TERRELL,
C. L. BATES,
Counsel for Plaintiff, The Rathbun-Jones Engineering Co.

The defendant is required to answer each and all of the above numbered interrogatories.

TERRELL & TERRELL,
C. L. BATES,
Counsel for Plaintiff.

EXHIBIT A.

The Rathbun-Jones Engineering Company.
General Offices, Spencer Street, Toledo, Ohio.

12 No. 622. Toledo, O., Aug. 2, 1909.

Agreement by and between The Rathbun-Jones Engineering Company, a corporation of the State of Ohio, hereinafter called the Company, and Peoples Light Co., of Corpus Christi, Texas, hereinafter called the Purchaser.

1. The Company undertakes to furnish for the Purchaser the machinery herein specified, subject to the conditions, and for the consideration hereinafter set forth.

2. The attached proposition, if accepted by the purchaser within fifteen days from date of its submission and approved by an executive officer of the Company, is a contract between the parties hereto, and it is agreed and understood that all previous communications between said parties, either verbal or written, contrary to the provisions hereof are hereby abrogated and withdrawn, and that all changes or additions hereto shall be in writing.

3. This contract is made subject to strikes, accidents, delays of carriers or causes beyond the control of the Company.

4. The Company will, at its own cost and expense defend any suit that may be instituted by any party against the purchaser for an alleged infringement of any patent, when such infringement shall consist in the use of apparatus machinery or device manufactured and sold by the Company, provided the purchaser is not in default in his payments as hereinafter set forth and immediate notice of the institution of such suit is given in writing by said purchaser to the Company, and the Purchaser permits the Company through its counsel to defend the same,

and gives all needed information, assistance and authority to enable the Company to do so. In case of an award of damages in any suit, the Company will pay such award and replace the apparatus or devise with another equally workable.

5. The title and ownership of the property specified in this contract remains in the Company until the full and final payment therefor shall have been made by the Purchaser and until notes, if any, shall have been paid in full. The purchaser agrees to do all acts necessary to perfect and maintain such retention of title in the Company.

6. The apparatus herein mentioned is sold delivered on the cars at the shop of the Company, unless otherwise expressly stipulated, and transportation and cartage charges after such delivery are to be paid by the
13 Purchaser.

7. The Purchaser will insure the machinery when it leaves the premises of the Company as the interest of the Company may appear pending the final payment in lawful money of the consideration named herein, or compensate the Company for any loss resulting from his neglect or failure to do so.

8. The Company will furnish foundation plans suitable for reliable soil without charge to Purchaser. Foundation bolts will be shipped before the time designated for the delivery of the engine,—the Purchaser undertakes to place them in accordance with the plans furnished by the Company. The Company is responsible for accuracy of the plan, but not for the placing of such bolts nor for any defects arising from the character of the soil or the material or workmanship connected with the foundation.

9. The engine will be assembled and operated at the Company's shop; the Purchaser will be notified of the time and is invited to be present when it is tested. The Purchaser agrees to accept the shop test unless herein otherwise expressly provided.

10. If the Company erects and demonstrates the plant on the premises of the Purchaser, the said Purchaser agrees to obtain all police permits and authority for making the installation, and to reimburse the Company for all incidental losses resulting from his delay or inability to do so.

11. The Company will, at the request of the purchaser, furnish a competent man to superintend the erection and to instruct an engineer in the operation of the power plant; the charge for this service will be six dollars and fifty cents ($6.50) per day from the time the man leaves the shop until he returns, and in addition the traveling and living expenses incurred in the interim. If the Company also furnishes tools for the erection, Purchaser agrees to pay an additional $10.00 per day and the transportation charges therefor.

12. All piping and fittings not expressly enumerated in the contract will be furnished by or at the ex-
14 pense of the Purchaser.

13. The machinery herein specified is guaranteed against defective workmanship or material for a period of one year. Should a defect develop, the imperfect part will be replaced without cost to the Purchaser, provided that an inspection proves the claim. The Company will not repay any expense for repairs made, apparatus furnished or work done by others without the direct authority of one of its executive officers.

14. The Company will furnish the apparatus in accordance with the specifications hereto attached and made a part of this agreement under the conditions herein set forth for the consideration of the fourteen thousand dollars, $14,000, and the Purchaser agrees to pay 60% on receipt of the bill of lading; 40% in sixty days thereafter.

15. Shipment will be made in about 75 days after approval of contract.

Respectfully Submitted,
THE RATHBUN-JONES ENGINEERING CO.,
By (Sgd) GEO. J. RATHBUN.
Issued from Toledo, O., dated Aug. 2, 1909.

ACCEPTANCE.

The Rathbun-Jones Engineering Company:
Your proposal No. 622, at the price and upon the terms and conditions named, is hereby accepted this thirteenth day of November, 1909.

PEOPLES LIGHT CO.,
By (Sgd). GEO. A. BLUCHER, Pres.

Approval of Proposition and Acceptance.

The above proposition and acceptance of same are hereby approved.

THE RATHBUN-JONES ENGINEERING COMPANY
By .....
Toledo, Ohio, ... 190.

The Rathbun-Jones Engineering Company.

General Offices, Spencer Street, Toledo, Ohio.
No. 622. Date, Aug. 2, 1909.

The Company proposes to furnish the following
15 apparatus F. O. B. cars Corpus Christi, Texas.

Engines.
No. Units 1 Rated BHP 300 No. Cyl. 3 Dia Cyl. 20 Length Stroke 20 Rev. per minute 225 kind of gas producer Approximate Ship. Wt. 77000 #. all arranged with extended shaft flexible coupling, outboard bearing and generator sole

plates. An erecting engineer will be furnished for fifteen day. One No. 7-R. D. Wood & Co.'s Lignite producer as per attached specifications. The fuel consumption at rated load will not exceed two pounds of a good quality of Texas Lignite (clean Rockdale or equivalent) per B. P. H. hour. Valves will be operated by means of roller path levers and eccentrics.

The difference in speed at no load and at full load will not exceed 4%. On loads within 10% of rating engines will use in fuel per BHP hour not to exceed.

When operating at rated speed on gas having heating value of 135 B T U per cubic foot, engines will be provided with sufficient cylinder capacity to develop 350 B. H. P.

The Rathbun-Jones Engineering Co., Toledo, Ohio.

Regular Equipment unless otherwise specified:

With each engine is included:—An extra double igniter for each cylinder; one extra exhaust valve and cage complete; platform with brass raling and stairs arranged for conveniently handling the exterior mechanism; permanent fixtures for removing the gear case cover; oil and grease cups, where provision for them has been made; an induction coil for each cylinder; one ignition cut-off switch; one graduated gas valve; one globe valve for controlling the compressed air at the engine; a suitable gas regulator, when gas pressure exceeds 6 inches of water column; an extended shaft and adjustable outboard bearing; sole plates for generator if direct connected, or pulley for belt drive. No sub-base is included unless particularly specified.

With each Installation is included: Steel tanks sufficient in number for the installation, equipped with gauge and shut-off valves; all ignition apparatus is included, except charging lamps when necessary and wiring between various parts of the system; a stand and lever for turning over the engines by hand.

No pipe is included in regular equipment, or
16 shut-off valves other than those specially mentioned.

General Description of Apparatus:

The Rathbun Gas Engine is of the vertical multiple cylinder, four-cycle type, consisting principally of a base and housing, cylinders, cylinder heads and manifolds.

The Base is of cast Iron and contains the main journals and crank shafts and acts as a reservoir for the lubricating oil. Hand holes are placed opposite each main journal.

The housing is of cast iron, reinforced by steel column so placed as to carry directly to the main journals all strain due to the connecting rod thrust. In one side of the housing is mounted the cam shaft with its accompanying valve operating machanism, all of which is protected by a cast iron cover. In the housing opposite each connecting rod is located a large door, making parts within the housing readily accessible.

The Cylinders are simple castings of close grained iron with provision for reboring. They are bolted separately to the housing and are provided with ample openings through which the water jackets may be cleaned.

The Cylinder heads connect with the cylinders by ground joints and are held in place by eight steel studs. The heads contain the exhaust and admission valves, air starting valves and igniters—all of which are mounted in removable cages fitted with ground joints.

The Admission Manifold carries the throttel valve and connects the cylinder heads together on one side, on the other side the Exhaust Manifold leads the exhaust from each head into the exhaust pipe.

The Fly Wheel is cast with a solid rim and split hub, the hub being sufficiently long to act as a coupling between the standard engine shaft and the extended portion which may be of such size and length as required.

Materials used for Various parts:

Crank shaft-nickel steel forging.
Connecting Rods—Open hearth steel forgings.
Rocker Arms-Maleable iron or steel castings.
Exhaust Valves-hollow steel forgings.
Admission valves-solid steel forgings.
Side Shaft gears-steel casings.

Push rods-steel tubes or bars.

Cross head pins-tool steel, hardened and ground and keyed in place.

Cams-cast iron, with chilled faces; ground.

Rollers-tool steel, hardened and ground.

Roller arms-malleable iron castings.

Side shaft-steel bar, ground to size.

Operating Features:

Adjustment and Provision against wear: Adjustment is provided at all points subject to continuous wear and all adjustments with the exception of the connecting rod ends may be made while engine is running.

Rollers, pins and cams are hardened and ground.

The main journals and connecting rod boxes take up by means of wedges.

All journals are lined with best grade of babbitt, except Cross head boxes which are of hand bronze turning on hardened and ground steel pins.

Starting: On two cylinder engines compressed air is admitted to one clyinder only at each down stroke, the cam rollers being shifted in the operation. On engines having more than two cylinders, compressed air is admitted to each cylinder on its working stroke, none of the principal operating mechanism being disturbed, although the auxiliary air cams may be thrown out of action, if desired.

Governing: A ball bearing Centrifugal Governor which is practically free from sticking is located within the engine housing and acts directly on a simple balanced, disc throttle-valve which controls the quantity of mixture in proportion to the load. The gas supply may be separately controlled when necessary and maintains automatically the best operating mixture under varying load conditions.

The timing of the ignition is automatically advanced by the governor on light loads and may also be controlled by hand.

An adjustment is provided for changing the engine speed while running.

Lubrication: The base is partly filled with oil, the level being indicated on an exterior glass gauge.

Splashers on the ends of the connecting rods dip into the oil, throwing it onto the pistons and other working parts within the housing. Oil or grease is used on journals not subject to the splash lubrication.

The main journals are oiled also by gravity feed.

Cylinder and Head Construction:

In order to obtain the highest efficiency in gas engine practice, it is absolutely necessary that the surface of the combustion chamber exposed to the burning gasses should be minimum. Practically the only method of obtaining such a result is by placing the valves directly in the head; this design being followed in Rathbun engines. The heads are readily removed, being held in place by studs, and the joints between heads and cylinders are ground, both cylinders and heads are provided with large openings through which all parts of both castings can be readily reached for purposes of inspection and cleaning.

Piston Construction: The piston is provided with an air pocket in the head which prevents the accumulation of oil on the hot center of the casting; such an accumulation will carbonize and work back into the engine, and when it does so may cause trouble in the journals.

Five rings are provided, the top one being an ordinary snap ring, the others being of special construction whereby they always maintain contact against the lower half of the slot instead of working from side to side with the motion of the piston. These are essentially for preventing the oil from passing into the combustion chamber.

A valuable feature is also provided in a connection through the cylinder wall which is always in communication with the space between the two lower rings and carries off the burning gasses, dirty oil and products of wear from the cylinder instead of allowing them to work down into the engine housing. In operating on pro-

ducer gas it is very often found that the sulphur contents will produce most undesirable results in the engine housing, affecting the cross-head brasses and in some cases the babbitt, and even the steel parts of the machine besides discharging disagreeable fumes into the engine room. Pipes from these vents on the cylinder are carried to an oil separating pot and from there a pipe to the open air disposes of the objectionable gasses.

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Main journal construction:

The main journal boxes are held firmly between jaws which form part of the engine base. The journal caps are lipped over the jaw, and being bolted down metal to metal with same helps to form a very rigid and stable construction. The journal boxes rest on wedges, adjustable from the outside of the engine. Due to the fact that the journal caps are not subject to wear, these caps being permanently placed in the engine gives means for very readily lining up the crank shaft by the simple process of drawing up the shaft against the caps and slackening off sufficiently to give the proper running clearance.

Means are provided for tramming the crank shaft its entire length from the top of the housing which is planned parallel to the center line of the shaft.

By removing the journal adjusting bolts the wedge may be taken out sideways into the engine base. This allows the journal box to be dropped and removed in like manner. The caps also may be removed, thus providing a means for replacing all the main journals without disturbing the crank shaft. The journal cap studs are continued upward through the housing, forming stay bolts, through which all stains incident to the pressures in the cylinders are carried directly to the main journals, the cast-iron housing not being relied upon to transmit these strains. The housing, however, is heavily ribbed and of substantial construction and in conjunction with the staybolts forms a very rigid and strong arrangement.

Connecting Rod.

The Connecting Rod is of forged steel with strap ends, adjustment at both crank and crosshead being obtained by wedge and bolt. Boxes at crosshead end are of phosper bronze working on a hardened and ground steel pin. The boxes at crank end are malleable iron which are tinned and then lined with genuine babbitt.

20

Housing Construction.

On account of the strength and rigidity obtained through the stay-bolt construction it is possible to have unusually large doors in the housing, thus providing for most convenient and ready access to the rods and journals. On the operating side of the engine the removal of a large cover provides ready access to all the operating machanism. Fixtures are provided for handling this cover which is also provided with hand-hole plates for inspection and minor adjustments. All parts of the valve-operating mechanism are provided against wear.

Governor:

The governor is of the fly-ball type, operating directly on the throttle valve. The governor also changes the timing of the ignition to suit the compression as affected by the throttling. This is an important feature affecting the economy when operating on variable loads. The governor is ball bearing, having a ball race substituted in place of the usual feather-key. This insures operation free from sticking and very sensative to changes of speed. The governor is affected by the action of a two-disc balance valve operating directly on the mixture. This type of valve is particularly free from the effects due to dirty gas. The quality of the mixture as regulated by an additional valve in the gas line, and by a device peculiar to this engine. Two settings of the mixture may be made one for light load and another for full load. This arrangement assures an automatic maintainance of a proper mixture at practically all loads.

Corpus Christi, Texas, 11/12/09.

The Peoples Light Company,
Corpus Christi, Texas,

Dear Sir:

We are pleased to offer you one 300 H. P. Gas Producer Plant to operate on lignite coal f. o. b. Cars Corpus Christi, Texas, for the sum of thirty two hundred ($3200.00) dollars, terms 50% as the material is delivered, 25% in 30 days and the balance 60 days after due date of first payment.

This plant will produce from lignite coal sufficient gas to operate a 300 H. P. Gas engine and the gas will be clean so as to be suitable for use in any of the Standard Gas Engines which are properly designed to use producer gas. When operating in connection with a gas engine requiring 15,000 B. T. U. per K. W. hour, there should not be required over 3 # of lignite charged to the producer per K. W. developed.

21

The plant will consist of the following apparatus:

1 #7 Water sealed gas producer with water cooled top and distributing feed.
1 Tar storage tank and connection to producer.
1. Saturator designed for salt water.
1 Scrubber arranged for using salt water.
1 Rotary Tar extractor provided with pully for belt drive.
1 Moisture separator which is to be placed in the gas line near the engine.

Blower for starting.
All gas piping to the outlet of tar extractor and including vant pipe.
Water pipes at the producer plant running to one point to which you are to connect.
Set of firing tools and gauge board.
Necessary firebuck and fire clay for lining the producer.
We will furnish you the necessary drawings and instructions for setting up and operating the Plant but should

you require one of our men to superintend the erection or starting up, we will furnish you such service at the rate of $6.50 per day, you to pay in addition the traveling expenses to and from your plant.

We trust that we may enter your order for the above apparatus and will give it our most careful attention.

Yours truly,
R. D. WOOD & CO.,
(Signed) CHARLES A. LUMMIS,

Accepted:
THE PEOPLES LIGHT CO.

Accepted:
(Seal) R. D. WOOD & CO.

Indorsed: Peoples Light Co., Contract #94, Shipt and charged 2/24/10 No. 3862. Filed and entered on Chattel Mtge. Record in my office in Book G Page 177 June 12, 1911, at 2:05 o'clock, P. M. H. E. Luter, Clerk C. C. N. C.

22 The State of Texas,
County of Nueces.

I, H. E. Luter, Clerk of the County Court in and for Nueces County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the Chattel Mortgage from the Peoples Light Co. to The Rathbun-Jones Engineering Company, as the same appears of record in Book G page 177 record of Chattel Mortgages of Nueces County, Texas, the original of which is also on file in my office.

Witness my hand and the seal of said office at Corpus Christi, Texas, this the 23rd day of April A. D. 1912.

H. E. LUTER,
(Seal) Clerk County Court, Nueces County, Texas.
By J. A. MOUNT,
Deputy.

Indorsed: Original Bill. Filed this 12th day of June, 1912.

ORIGINAL DECREE OF JANUARY 9, 1914.

In the District Court of the United States for the Southern District of Texas, Corpus Christi, Division.

The Rathbun-Jones Engineering Co., Plaintiff
vs. No. 3. In Equity.
Peoples Light Company, Defendant.

January 9, 1914.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

That plaintiff do have and recover of and from the defendant the sum of five thousand five hundred and sixty-seven dollars and fourteen ($5,567.14) cents, together with interest thereon at the rate of 6% per annum from and after March 1, 1910, amounting to the sum of one thousand two hundred and thirty-seven dollars and seventy-six ($1,237.76) cents, aggregating the
23 sum of six thousand eight hundred and four dollars and ninety ($6804.90) cents.

It is further ordered that plaintiff recover from defendant interest on said aggregate amount from the date of this judgment until paid at the rate of 6% per annum.

It is further ordered, adjudged and decreed that the lien of plaintiff as alleged in its petition be and the same is hereby established and fixed, and if this judgment is not paid within 60 days from this date, then the clerk of this Court is directed to issue process directed to the marshal commanding him to sell the following described property to satisfy this judgment and costs of Court.

One, three hundred horse power gas engine, manufactured by the Rathbun-Jones Engineering Company of Toledo, Ohio, together with all of the equipment furnished to the defendant, The Peoples Light Company, in connection with said gas engine. One number seven R. D. Wood & Company's Lignite Producer, also one number eight R. D. Wood & Company's Lignite Producer.

Both of said producers having been manufactured by R. D. Wood & Company and furnished to the Peoples Light Company by the Rathbun-Jones Engineering Company, in connection with the above described gas engine. All of said machinery and equipment being now in use by the Peoples Light Company at its plant and installed on lots two, three, four and five in Water Block Three of the Beach portion of the City of Corpus Christi, Texas.

It is further ordered that plaintiff recover from defendant all costs in this behalf incurred. To which judgment defendant excepted in open Court and gave notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit, ninety days after adjournment allowed defendant to perfect his appeal.

W. T. BURNS,
Judge United States District Court, for the Southern District of Texas.

Indorsed: Final Decree. Filed Jan. 9th, 1914.

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24 PETITION FOR APPEAL BY THE PEOPLES LIGHT COMPANY, DEFENDANT.

In the District Court of the United States, for the Southern District of Texas, sitting at Corpus Christi.

The Rathbun-Jones Engineering Company, Plaintiff
vs. No. 3. In Equity.
The Peoples Light Company, Defendant.

To the Honorable Judge of said Court:

The petition of the Peoples Light Company, defendant in the above numbered and styled cause, respectfully shows:

That on the 9th day of January, 1914, the Honorable Judge of this Court entered a decree in which it was ordered and decreed that the Rathbun-Jones Engineering

Company, plaintiff, do have and recover of and from the defendant, the Peoples Light Company, the full sum of $6804.90, together with interest thereon at the rate of six per cent per annum from the date thereof, and further decreeing and establishing a lien on and ordering the sale of the following described personal property, to-wit:

One, three hundred horse power gas engine, manufactured by the Rathbun-Jones Engineering Company of Toledo, Ohio, together with all of the equipment furnished to the defendant, the Peoples Light Company, in connection with said gas engine. One number seven R. D. Wood & Company's Lignite Producer, also one number eight R. D. Wood & Company's Lignite Producer, both of said producers having been manufactured by R. D. Wood & Company and furnished to the Peoples Light Company by the Rathbun-Jones Engineering Company, in connection with the above described gas engine, all of said machinery and equipment being now in use by the Peoples Light Company at its plant and installed on lots two, three, four and five in Water Block Three of the Beach portion of the City of Corpus Christi,
25 Texas; to satisfy said judgment, together with all costs in said behalf incurred.

This petitioner shows that it is aggrieved by said decree and prays an appeal from the decree entered as aforesaid, to the United States Circuit Court of Appeals for the Fifth Circuit at Fort Worth, Texas, to the end that said decree may be reviewed and reversed and judgment herein rendered in favor of the defendant.

It files herewith its assignments of error and asks that the Court fix the amount of its bond.

It further prays that the record herein be made in accordance with Rule 75 of the Rules of Practice for the Courts of Equity of the United States, promulgated by the Supreme Court of the United States, and that so much of said record as may be necessary to determine this

appeal be certified to the United States Circuit Court of Appeals for the Fifth Circuit at Fort Worth, as required by the law.

JNO. C. SCOTT,
FRANK H. BOOTH,
Attorneys for Peoples Light Company.

Upon considering the foregoing petition, the appeal as prayed for is granted and the bond on appeal fixed at the sum of $7500.00, the bond to be approved by the clerk.

Mch. 9, 1914. W. T. BURNS, Judge.

Indorsed: Petition for Appeal and Allowance thereof. Filed Mch. 9, 1914.

APPEAL BOND.

Filed March 9, 1914.

In the District Court of the United States for the Southern District of Texas, at Corpus Christi.

The Rathbun-Jones Engineering Co.
26 vs. No. 3. In Equity.
Peoples Light Company.

Know all men by these presents: That we, The Peoples Light Company, as principal, and.....and.....as sureties, are held and firmly bound unto the Rathbun-Jones Engineering Company, a corporation, in the full sum of seventy-five hundred ($7500.00) dollars, to be paid to the said Rathbun-Jones Engineering Company, its successors and assigns, to which payment well and truly to be made we bind ourselves our heirs, executors and administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this the 7th day of March, A. D. 1914.

Whereas, at a regular term of the District Court of the United States for the Southern District of Texas, at Corpus Christi, and on the 9th day of January, 1914, in a suit pending in said Court between the Rathbun-Jones Engineering Company, as complainant, and the Peoples Light Company, as defendant, a final decree was entered therein that the plaintiff, Rathbun-Jones Engineering Company do have and recover of and from the defendant the full sum of sixty-eight hundred four and 90/100 ($6804.90) with six per cent from the date of said judgment, and further ordering and decreeing a lien on certain property hereinafter described and ordering the sale thereof in satisfaction of said judgment, to-wit:

One, three hundred horse power gas engine, manufactured by the Rathbun-Jones Engineering Company of Toledo, Ohio, together with all of the equipment furnished to the defendant, the Peoples Light Company, in connection with said gas engine. One number seven R. D. Wood & Company's Lignite Producer, also one number eight R. D. Wood & Company's Lignite Producer, both of said producers having been manufactured by R. D. Wood & Company and furnished to the Peoples Light Company by the Rathbun-Jones Engineering Company, in connection with the above described gas engine, all of said machinery and equipment being now in use by the Peoples Light Company at its plant and installed on lots two, three, four and five in Water Block Three of the Beach Portion of the City of Corpus Christi, Texas; and the said defendant, Peoples Light Company has obtained an appeal of said cause to the Circuit Court of Appeals for the Fifth Circuit, to reverse the decree aforesaid, and a citation directed to the said Rathbun-Jones Engineering Company, citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Fifth Circuit at the City of New
27 Orleans, Louisiana, thirty days from and after the above date of said citation.

Now, therefore, the condition of the above obligation is such that if the said Peoples Light Company shall

prosecute its appeal to effect and answer all damages and costs, it it fails to make its plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

Signed and sealed this the 7th day of March A. D. 1914.

[Seal] PEOPLES LIGHT COMPANY, Principal,

By GEO. A. V. BLUCHER, Pres.
CLARK PEASE, Surety.
GUST. HEYE, Jr., Surety.

Approved this the 9th day of March, A. D. 1914.

L. C. MASTERSON, Clerk.
By J. A. MOUNT, Deputy.

Indorsed: Bond on appeal. Filed at 2:45 P. M., March 9th, 1914.

MANDATE OF THE CIRCUIT COURT OF APPEALS.

United States of America, ss.

The President of the United States of America,

To the Honorable the Judge of the District Court of the United States for the Southern District of Texas: Greeting:

Whereas, lately in the District Court of the United States for the Southern District of Texas, before you, in a cause between The Rathbun-Jones Engineering Company, complainant, and The Peoples Light Company, defendant, No. 3, in Equity, the following decree was made and entered, to-wit:

In the District Court of the United States, for the Southern District of Texas, Corpus Christi Division.

The Rathbun-Jones Engineering Company, Plaintiff,
vs. No. 3. In Equity
28 Peoples Light Company, Defendant.

January 9, 1914.

This cause came on to be heard at this term, and was argued by counsel; and thereupon upon consideration thereof, it was ordered, adjudged and decreed as follows:

That plaintiff do have and recover of and from the defendant the sum of five thousand, five hundred and sixty-seven dollars and fourteen ($5,567.14) cents, together with interest thereon at the rate of 6% per annum from and after March 1, 1910, amounting to the sum of one thousand two hundred and thirty-seven dollars and seventy-six ($1237.76) cents, aggregating the sum of six thousand, eight hundred and four dollars and ninety ($6,804.90) cents.

It is further ordered that plaintiff recover from defendant interest on said aggregate amount from the date of this judgment until paid at the rate of 6% per annum.

It is further ordered, adjudged and decreed that the lien of plaintiff as alleged in its petition be and the same is hereby established and fixed, and if this judgment is not paid within 60 days from this date, then the Clerk of this Court is directed to issue process directed to the marshal commanding him to sell the following described property to satisfy this judgment and costs of Court:

"One, three hundred horse power gas engine, manufactured by the Rathbun-Jones Engineering Company, of Toledo, Ohio, together with all of the equipment furnished to the defendant, the Peoples Light Company, in connection with said gas engine. One number seven R. D. Wood & Company's Lignite Producer, also one number eight R. D. Wood & Company's Lignite Producer, both of said producers having been manufactured by R. D.

Wood & Company and furnished to the Peoples Light Company by the Rathbun-Jones Engineering Company, in connection with the above described gas engine. All of said machinery and equipment being now in use by the Peoples Light Company at its plant and installed on lots two, three, four and five in Water Block three of the Beach portion of the City of Corpus Christi, Texas."

It is further ordered that plaintiff recover from defendant all costs in this behalf incurred. To which judgment defendant excepted in open Court and gave notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit, ninety days after adjournment allowed defendant to perfect his appeal.

W. T. BURNS,
Judge United States District
Court for the Southern Dis-
trict of Texas.

29

As by the inspection of the transcript of record of the said District Court which was brought into the United States Circuit Court of Appeals for the Fifth Circuit, by virtue of an appeal sued out by the Peoples Light Company, agreeably to the act of Congress is such case made and provided, fully and at large appears.

And whereas, in the present term of November, in the year of our Lord one thousand nine hundred and fourteen, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause, be, and the same is hereby affirmed;

It is further ordered, adjudged and decreed that the appellant, The Peoples Light Company, and the sureties on the appeal bond herein, Clark Pease and Gust Heye, Jr., be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of said District Court.

December 9th, 1914.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause as according to right and justice, and the laws of the United States, ought to be had, the said Writ of Error notwithstanding.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the ninth day of January, in the year of our Lord one thousand nine hundred and fifteen.

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the
30 Fifth Circuit.

Indorsed: Mandate. Filed Jan. 20, 1915.

ORDER ON MANDATE.

In the District Court of the United States, for the Southern District of Texas, Corpus Christi Division.

The Rathbun-Jones Engineering Company

vs. Equity. No. 3.

Peoples Light Company.

It appearing to the Court that in the above entitled cause the complainant, The Rathbun-Jones Engineering Company, recovered a judgment herein on January 9th, 1914, against the defendant, Peoples Light Company, for the sum of six thousand eight hundred and four ($6804.90) and 90/100 dollars, together with interest at the rate of six per cent from date thereof until paid and all costs incurred, and,

Whereas, the said defendant appealed from said judgment to the United States Circuit Court of Appeals for the Fifth Circuit, and

Whereas, said Court on December 9th, 1914, affirmed the judgment of this Court, and caused its mandate to be issued to the Clerk of this Court.

It is therefore ordered that said mandate be made the judgment of this Court, and it is further ordered that the Clerk of this Court issue an order of sale as in the decree of this Court provided, directed to the marshal of this district, commanding him to sell the property described in the judgment rendered herein to satisfy said judgment, interest and costs, and it is further ordered that in the event said property does not sell for sufficient amount to satisfy said judgment, interest and costs, the clerk of this Court issue execution against the defendant and against the sureties on the appeal bond herein, Clark Pease and Gust Heye, for any deficiency that may remain.

W. T. BURNS, Judge.

31 Houston, Texas, February 24, 1915.

Indorsed: Decree on mandate. Filed 25 Feb., 1915.

ORDER OF SALE ISSUED MARCH 8, 1915.

In the District Court of the United States for the Southern District of Texas, Holding Sessions at Corpus Christi.

The President of the United States of America.

To the Marshal of the Southern District of Texas—Greeting:

Whereas, the Rathbun-Jones Engineering Company, Complainant, on the 9th day of January, one thousand nine hundred and fourteen, at our District Court of the United States in and for the Southern District of Texas, holding sessions at Corpus Christi, recovered a judgment against Peoples Light Company, defendant, for the sum of six thousand eight hundred and four dollars and ninety cents ($6804.90), principal and interest, with interest

thereon from said 9th day of January, 1914, at the rate of 6% per annum until paid, together with all their costs in this behalf expended.

And, whereas, it was further ordered, adjudged and decreed by the Court that the lien of Complainant as alleged in its complaint be, and the same is, hereby established and fixed, and that if this judgment is not paid within sixty (60) days from this date, then the clerk of this Court is directed to issue process directed to the marshal commanding him to sell the following
32 described property to satisfy this judgment and costs of Court:

"One three hundred horse power gas engine, manufactured by the Rathbun-Jones Engineering Company of Toledo, Ohio, together with all of the equipment furnished to the defendant, the Peoples Light Company in connection with said gas engine. One number seven R. D. Wood & Company's Lignite Producer, also one number eight R. D. Wood & Company's Lignite Producer. Both of said producers having been manufactured by R. D. Wood & Company and furnished to the Peoples Light Company by the Rathbun-Jones Engineering Company, in connection with the above described gas engine. All of said machinery and equipment being now in use by the Peoples Light Company at its plant and installed on lots two, three, four and five in Water Block three of the Beach portion of the City of Corpus Christi, Texas."

And, whereas, Peoples Light Company, defendant, perfected an appeal from said judgment to the United States Circuit Court of Appeals for his Fifth Circuit, and, whereas on December 9th, 1914, said United States Circuit Court of Appeals affirmed the judgment of this Court recited above, and adjudging the costs of said appeal against the Peoples Light Company and the sureties on its appeal bond, to-wit, Clark Pease and Gust Heye, Jr., in solido, as appears from the mandate received from said Circuit Court of Appeals and filed herein on January 20, 1915;

Wherefore, in accordance with said judgment of the United States District Court for the Southern District of Texas and the decree of the United States Circuit Court of Appeals for the Fifth Circuit affirming said judgment, you are hereby commanded to sell the following described property as under execution, to-wit:

"One three hundred horsepower gas engine, manufactured by the Rathbun-Jones Engineering Company of Toledo, Ohio, together with all of the equipment furnished to the defendant the Peoples Light Company in connection with said gas engine. One number seven R. D. Wood & Company's Lignite Producer, also one number eight R. D. Wood & Company's Lignite Producer. Both of said producers having been manufactured by R. D. Wood & Company and furnished to the Peoples Light Company by the Rathbun-Jones Engineering Company, in connection with the above described gas engine. All of said machinery and equipment being now in use by the Peoples' Light Company at its plant and installed on lots two, three, four and five in Water Block
33 three of the Beach portion of the City of Corpus Christi, Texas;"

And, you are further commanded that you apply the proceeds arising from said sale to the payment and satisfaction of the said sum of $6804.90, together with all interest that may be due thereon and the costs of this suit. And, if the said property shall sell for more than sufficient to pay off and satisfy said sums of money, then the said officer (marshal) is hereby directed to pay the excess into the registry of this Court, subject to the future orders of the Court; but, if the said above described property shall not sell for enough to pay off and satisfy this judgment, then said officer (marshal) shall make the balance due as under execution against said defendant, Peoples Light Company, and Clark Pease and Gust Heye, Jr., sureties on its supersedeas bond on appeal.

And you are further ordered to place the purchaser of said property in possession thereof within thirty (30)

days after the day of sale, and this Order of Sale shall have all the force and effect of a writ of possession.

A duly certified copy of the said final decree rendered by the United States District Court for the Southern District of Texas in this cause on January 9, 1914, is here unto annexed, and made a part of this order of sale.

Herein fail not and due return of this writ make showing how you have executed the same.

Witness the Honorable Waller T. Burns, Judge of the District Court of the United States for the Southern District of Texas and the seal of the District Court of the United States for the Southern District of Texas, at Corpus Christi this 8th day of March, 1915.

[Seal] L. C. MASTERSON,
Clerk U. S. District Court,
Southern District of Texas.
By J. A. MOUNT, Deputy.

(Judgment of the Court.)

In the District Court of the United States for the Southern District of Texas, Corpus Christi Division.

The Rathbun-Jones Engineering Company, Plaintiff,
vs. No. 3. In Equity.
34 Peoples Light Company, Defendant.

January 9, 1914.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

That plaintiff do have and recover of and from the defendant the sum of five thousand five hundred and sixty-seven dollars and fourteen cents ($5,567.14) together with interest thereon at the rate of 6% per annum from and after March 1, 1910, amounting to the sum of one thousand two hundred and thirty-seven dollars and seventy-six cents, ($1,237.76) aggregating the sum of six thousand eight hundred and four dollars and ninety cents. ($6,804.90).

It is further ordered that plaintiff recover from defendant interest on said aggregate amount from the date of this judgment until paid at the rate of 6% per annum.

It is further ordered adjudged and decreed that the lien of plaintiff as alleged in its petition be and the same is hereby established and fixed and if this judgment is not paid within 60 days from this date then the clerk of this Court is directed to issue process directed to the marshal commanding him to sell the following described property to satisfy this judgment and costs of Court:

"One three hundred horse power gas engine, manfactured by the Rathbun-Jones Engineering Company of Toledo, Ohio, together with all of the equipment furnished to the defendant the Peoples Light Company in connection with said gas engine, One number seven R. D. Wood & Company's Lignite Producer also one number eight R. D. Wood & Company's Lignite Producer. Both of said producers having been manufactured by R. D Wood & Company and furnished to the Peoples Light Company by the Rathbun-Jones Engineering Company, in connection with the above described gas engine. All of said machinery and equipment being now in use by the Peoples Light Company at its plant and installed on lots two, three, four and five in Water Block three of the Beach Portion of the City of Corpus Christi,
35 Texas."

It is further ordered that plaintiff recover from defendant all costs in this behalf incurred. To which judgment defendant excepted in open Court and gave notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit, ninety days after adjournment allowed defendant to perfect his appeal.

W. T. BURNS,
Judge United States District Court for the Southern District of Texas.

Indorsement: No. 3 in Equity. The Rathbun-Jones Engineering Co. Plaintiff vs. The Peoples Light Co., defendant. Final Decree. Filed Jan. 9th, 1914. L. C. Masterson, clerk by J. A. Mount, Deputy.

In the District Court of the United States for the Southern District of Texas, at Corpus Christi.

I, L. C. Masterson, Clerk of the District Court of the United States for the Southern District of Texas, in the Fifth Circuit and District aforesaid, do hereby certify the foregoing to be a true and correct copy of Final Decree, filed January 9th, 1914, in cause No. 5 on the Equity Docket of said Court, entitled The Rathbun-Jones Engineering Company, vs. The Peoples Light Company, as the same now appears on file and of record in my office.

To certify which, witness my hand and seal of said Court at Corpus Christi, in said District, this the 8th day of March, A. D. 1915.

[Seal]

L. C. MASTERSON,
Clerk U. S. District Court,
Southern District of Texas.
By J. A. MOUNT, Deputy.

Indorsed: Order of sale. Issued March 8, 1915. Returned and filed 24 day of May, 1915.

36 (Marshal's return on Order of Sale.)

Received within order of sale at Corpus Christi, Texas, on April 7, 1915, and partially executed the same at Corpus Christi on April 7, 1915, by advertising by publication in the Corpus Christi Caller and Daily Herald on April 10, 17 and 24, and May 1, 1915, this order of sale and notice of the date and time and place of sale; and further executed the same on the first Tuesday of May, 1915, that being the fourth day of May, 1915, by selling at public outcry at the door of the Courthouse of Nueces

County, in Corpus Christi, Texas, after first reading said order of sale and the full description of the property therein contained, and calling for bidders, and Clark Pease bid the sum of one thousand five hundred dollars ($1,500.00) and that being the highest, best and last bid therefor, the same was struck off to him for said sum of $1,500.00, out of which the following marshal's costs are first to be paid:

Advertising sale	$ 1.00
Expense publishing notice of sale	6.25
Return	.50
Commission	28.00
Bill of Sale	1.00
	$36.75

The clerk of the Court will make bill for his costs later.

J. A. HERRING,
United States Marshal, S.D.T.
By JOHN McKINNEY, Deputy.

ORDER OF THE COUNTY COURT APPOINTING ELENITA S. HEYE ADMINISTRATRIX.

No. 1071.
Estate of Gust. Heye, Jr., deceased.

On this 4th day of August, 1914, came on to be heard the petition of Elenita S. Heye to be appointed administratrix of the estate of the above names Gust Heye, Jr., deceased, when came said petitioner by her attorney and announced ready for a hearing of said petition; and citation to all parties interested in said estate having been duly issued and served in the manner and for the time provided by law; and the Court having heard said petition read, and having heard the evidence, and it appearing to the Court, from the evidence, that said Gust Heye, Jr.,

is dead and four years have not elapsed since his decease prior to the filing of said application, and that at the time of his death and for a long time prior thereto said Gust Heye, Jr., was a resident of Nueces County, Texas, and owned real and personal property situated in said County; and it further appearing that a necessity exists for an administration upon his estate, and that said
37 Elenita S. Heye is his surviving wife and is entitled under the law to be appointed administratrix of his estate, and is in no manner disqualified from serving as such administratrix, and there being no opposition or objection to the granting of said petition and the appointment of said Elenita S. Heye as administratrix of the estate of said Gust Heye, Jr., deceased, the Court is of opinion that said petition should be and the same now is in all things granted.

And it is accordingly ordered, adjudged and decreed that said Elenita S. Heye be and she now is hereby appointed administratrix of the estate of said Gust Heye, Jr., deceased, and her bond as such administratrix is now fixed at the sum of forty thousand dollars ($40,000.00), and when she has furnished such bond and same has duly been approved, and she has taken the oath required by law, the Clerk is directed to issue to her letters of administration.

And H. D. C. Gussett, Georgia Welch and H. E. Luter, three disinterested persons, and citizens of Nueces County, are appointed as appraisers to appraise all the property of the estate of said decedent; and when said administratrix has qualified as herein directed, she is directed, with the assistance of any two or more of said appraisers, to make or cause to be made a full inventory and appraisement of all the estate of said intestate, both real and personal, specifying in such inventory what portion of said estate is the separate property, and what portion, if any, is represented as community property; and said appraisement shall be sworn to by the appraisers, and be otherwise prepared as required by law.

And it appearing that said Elenita S. Heye has heretofore been duly appointed as temporary administratrix

of the estate of said decedent and has qualified and has been acting as such it is ordered that such temporary administration cease and terminate upon her giving the bond and qualifying as permanent administratrix of the estate of said decedent. And said Elenita S. Heye as such temporary administratrix is now hereby ordered and directed to forthwith file with the clerk of this Court a list of all the property of said decedent which has come into her hands, and a return of all sales made
38 by her, if any, and a full exhibit and account of all her acts as such administratrix, all of which shall be verified by her affidavit.

The State of Texas,
County of Nueces.

I, Aug. Uehlinger, clerk of the County Court in and for Nueces County, Texas, do hereby certify that the above and foregoing is a true and correct copy of Order appointing Elenita S. Heye, administratrix of the estate of Gust Heye, Jr., deceased cause #1071, as the same appears of record in Book "P" on pages 467 and 468 minutes of the probate court of said county.

To certify which, witness my hand and seal of office, at Corpus Christi, Texas, this the 6th day of May, 1915.

[Seal] AUG. UEHLINGER,
Clerk County Court, Nueces County, Texas.
By TILLIE COPELAND, Deputy.

Ten cents U. S. revenue stamp attached and cancelled 5/6/15.

Indorsed: Filed 6 day of May, 1915.

OATH AND BOND OF ELENITA S. HEYE, ADMINISTRATRIX.

The State of Texas,
County of Nueces.

Know all men by these presents, that we, Elenita S. Heye, as principal, and the Equitable Surety Company, of St. Louis, Missouri, as surety, are held and firmly bound unto the County Judge of the County of Nueces and his successors in office, in the sum of forty thousand dollars ($40,000.00); conditioned that the above bound Elenita S. Heye, who has been appointed by the County Judge of Nueces County, administratrix of the estate of Gust Heye, Jr., deceased, shall well and truly perform all the duties required of her under said appointment.

ELENITA S. HEYE, Principal.
EQUITABLE SURETY COM-
39 PANY,
By JESSE WRIGHT, Atty. in Fact.

(Seal)

I do solemnly swear that Gust Heye, Jr., deceased, died without leaving any lawful will, so far as I know or believe, and that I will well and truly perform all the duties of administratrix of the estate of said deceased.

ELENITA S. HEYE,

Subscribed and sworn to before me this 18th day of August, 1914.

H. E. LUTER,
Clerk of the County Court of Nueces County, Texas.
By CHAS. WALTERS, Deputy.

Approved Aug. 18, 1914.

WALTER F. TIMON, Judge.

Indorsed: No. 1071. Estate of Gust Heye, Jr., deceased. Bond and oath of Elenita S. Heye, as administratrix. Filed Aug. 18, 1914. H. E. Luter, Co. Clerk. By Chas. Walters, Deputy.

The State of Texas,
County of Nueces.

I, Aug. Uehlinger, clerk of the County Court in and for Nueces County, Texas, do hereby certify that the above and foregoing is a true and correct copy of bond of Elenita S. Heye, administratrix of the estate of Gust Heye, Jr., dec'd. #1071, as the same appears of record in Book "P" on pages 318 and 319, Minutes of the Probate Court of Nueces County, Texas.

To certify which, witness my hand and seal of office, at Corpus Christi, Texas, this the 6th day of May, A. D. 1915.

[Seal] AUG. UEHLINGER,
Clerk County Court, Nueces County, Texas.
By TILLIE COPELAND, Deputy.

Ten cents Revenue stamp attached and cancelled 5/6/15.

40 Indorsed: Filed 6 day of May, 1915.

ARTICLES OF DISSOLUTION OF PEOPLES LIGHT CO.

State of Texas,
County of Nueces.

Know all men by these presents, That we, the undersigned, being all of the stockholders of Peoples Light Company, of Corpus Christi, Nueces County, Texas, a corporation duly organized under the laws of the State of Texas, do each hereby consent, as evidenced by our respective signatures hereto attached, that the said Peoples Light Company shall from and after the date of filing hereof in the office of the secretary of State of Texas, be dissolved, as provided by law.

H. A. LANG,
EDWARD H. ELDRIDGE,
HAROLD J. VETTERS,
W. A. WHITWORTH.

We, the undersigned, Edward H. Eldridge, President, and Harold, J. Vetters, Secretary and Treasurer, of the corporation above named, do hereby certify that the above and foregoing consent to the dissolution of the Peoples Light Company is the true and correct action of all of the stockholders of said Company; and we further certify that the names and addresses of all the officers and directors of said Company are as follows:

Names Officers. Post Office Address.
President, Edward H. Eldridge, Corpus Christi, Texas;
Vice President, H. A. Lang, Philadelphia, Pa.
Secretary, Harold J. Vetters, Corpus Christi, Texas;
Treasurer, Harold J. Vetters, Corpus Christi, Texas;
Asst. Secretary, C. H. Weak, Philadelphia, Pa.
Asst. Treasurer, C. H. Weak, Philadelphia, Pa.

Directors: Post Office Address.
Edward H. Eldridge, Corpus Christi, Texas;
Harold J. Vetters, Corpus Christi, Texas;
41 W. A. Whitworth, Corpus Christi, Texas;
H. A. Lang, Philadelphia, Pa.

In testimony whereof, we have hereunto set our hands, this 26th day of January, 1915.

[Seal] EDWARD H. ELDRIDGE, President.
HAROLD J. VETTERS, Secretary,
HAROLD J. VETTERS, Treasurer.

Subscribed and sworn to before me, the undersigned authority, on this 26th day of January A. D. 1915.

[Seal] U. S. ALGEE,
Notary Public, Nueces County, Texas.

Indorsed: Filed in the office of the secretary of state this 27th day of January, 1915.

JNO. G. McKAY,
Secretary of State.

The State of Texas,
Department of State.

I John G. McKay, secretary of state of the State of Texas, and being the officer, who under the Constitution and laws of this state is the duly constituted keeper of the records of the Articles of Incorporation of all companies incorporated under the General Laws thereof, and the records of all papers relating to the creation of said incorporated companies, and empowered to authenticate exemplifications of the same, do hereby certify, that the annexed instrument is an exemplified copy, carefully compared by me with the original now on file in my office, in my official custody as secretary of state, and has been found to be a true and correct copy of Dissolution Peoples Light Company of Corpus Christi, filed in this office on 27th day of January, A. D. 1915, and duly recorded in the Records of Incorporations now on file in this department; that said exemplification is in due form and made by me as the proper officer, and is entitled to have full faith and credit given it in every Court and office within the United States of America.

In testimony whereof, I have hereunto signed my name officially and caused to be impressed hereon the great seal of state, at my office in the City of Austin, Texas, this the 4th day of May, A. D. 1915.

[Seal] JNO. G. McKAY,
Secretary of State.

Indorsed: Filed 6 day of May, 1915.

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42 PETITION FOR APPEAL BY CLARK PEASE.

In the United States District Court for the Southern District of Texas, Corpus Christi, Division.

To the Hon. Richard W. Walker, Circuit Judge:

The petition of Clark Pease respectfully shows that on the 9th day of January, A D. 1914, the United States

District Court for the Southern District of Texas, entered a decree in cause No. 5, on the Equity docket of said Court, styled Rathbun-Jones Engineering Company, Complainant, vs. Peoples Light Company, defendant, in which it was ordered, adjudged and decreed by the Court that complainant do have and recover of and from the defendant, the full sum of $6804.90, together with interest thereon at the rate of 6% per annum from the date thereof, and further establishing and decreeing a mortgage lien on, and ordering the sale of, certain property therein described; that on the 9th day of March, 1914, the defendant, Peoples Light Company being aggrieved by said decree, duly filed its petition for an appeal thereform to the United States Circuit Court of Appeals for the Fifth Circuit, and said appeal was on the same day allowed by the judge of said Court, and the bond of appellant fixed at the sum of $7,500.00, and on the same day appellant duly filed its bond on appeal, signed by Clark Pease and Gust. Heye, Jr., as sureties, conditioned as follows:

"Now, therefore, the condition of the above obligation is such that if said Peoples Light Company shall duly prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void otherwise to remain in full force and virtue."

That on the 9th day of December, 1914, said cause was by the Circuit Court of Appeals, aforesaid, affirmed, and judgment directed to be entered by the District Court in favor of appellee against appellant and the sureties on its bond aforesaid, all costs incurred on said
43 appeal; that the mandate of said Court was filed in the District Court on the 20th day of January, 1915; that thereafter, to-wit, on February 24, 1915, the District Court made and entered an order on mandate that said mandate be made the judgment of said Court; that the Clerk of the Court issue an order of sale as in the original decree provided, directed to the marshal of the district, commanding him to sell the property described in the decree aforesaid, to satisfy said decree, interest and

costs, and that in the event said property did not sell for sufficient amount to satisfy said decree, interest and costs, the Clerk of the Court issue execution against the defendant and the sureties on the appeal bond, Clark Pease (your petitioner) and Gust Heye, Jr., for any deficiency that might remain; that thereafter on the 8th day of March, 1915, said order of sale was issued pursuant to the order of February 24, 1915, and pursuant to the original decree, directing the sale of said property, and the Marshal did on May 4, 1915, sell all said property and realized therefrom the sum of $1500.00, which amount, is now in the registry of the Court, as petitioner is informed, and will be applied to the satisfaction of said decree, after the payment of the costs of sale, $36.75; that on May 21, 1915, the clerk of this Court issued an execution, by virtue of said order of February 24, 1915 (the original decree did not award such an execution) directed to the marshal of the district commanding him to make the balance on said decree as under execution against the Peoples Light Company, Gust. Heye, Jr., and Clark Pease.

Petitioner further shows that Gust Heye, Jr., one of the sureties on said bond died on or about the 2nd day of April, 1914, and Elenita S. Heye was on or about August 4, 1914, duly appointed administratrix of his estate by the Honorable County Court of Nueces County, Texas, sitting in Probate, and she not being a party to said suit, declines to join in this appeal; That on the 27th day of January, 1915, the Peoples Light Company defendant in this cause was dissolved under and in conformity with the laws of the State of Texas, and the trustees of said dissolved corporation have no right, and therefore, decline to join in this appeal.

Petitioner further shows that this cause has
44 not been revived against the legal representatives of either the Peoples Light Company or Gust Heye, Jr.

And in as much as said decree of February 24, 1915, in so far as it awarded and directed the issuance of an execution against your petitioner for the deficiency on said decree of January 9, 1915, after the application of the sale

of the mortgaged property, is a final decree, and the only decree ever entered in this cause to that date against your petitioner, and has not been set aside in any particular your petitioner being aggrieved thereat, and the proceedings thereunder in so far as they effect the rights of petitioner, prays an appeal therefrom to the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, to the end that said decree may be reviewed and reversed, and he files herewith his assignment of errors, and asks the Court to fix the amount of his bond.

He further prays that the record herein be made in accordance with the rules of practice for the Courts of Equity of the United States, promulgated by the Supreme Court of the United States, and that so much of the record as may be necessary to determine said appeal be certified to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, as required by law.

FRANK H. BOOTH,
Counsel for Petitioner.

Indorsed: Petition for an Appeal by Clark Pease. Filed 7th day of June, 1915.

ORDER ALLOWING APPEAL OF CLARK PEASE.

In the United States District Court for the Southern District of Texas, Corpus Christi, Division.

45 Rathbun-Jones Engineering Co.
vs. No. 5, Equity.
Peoples Light Co.

Upon consideration of the petition of Clark Pease praying an appeal from the decree entered in this cause on February 24, 1915, it is ordered that the Clerk of the United States District Court for the Southern District of

Texas, file the accompanying petition as of this date; that said appeal be and the same is hereby allowed, and the bond on appeal fixed at the sum of three hundred ($300.00) dollars; that the accompanying bond and assignments of error be filed as of this date; that so much of the record herein as may be necessary to determine said appeal be certified to the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, and that the record be made in conformity with the rule of practice for the Courts of Equity of the United States, promulgated by the Supreme Court of the United States, and that the citation on appeal do issue in conformity with law.

The Clerk will enter this order at the Copus Christi, division of the Court.

Ordered at Huntsville, Alabama, on this the 7th day of June, A. D. 1915.

R. W. WALKER,
United States Circuit Judge.

Indorsed: Order allowing Appeal of Clark Pease. Filed 7th day of June 1915.

APPEAL BOND.

In the District Court of the United States for the Southern District of Texas, Corpus Christi Division.

46 Rathbun-Jones Engineering Co.
vs. No. 5, In Equity.
Peoples Light Company.

Know all men by these Presents: That we, Clark Pease, as principal, and H. G. Sherman, Myron A. Pease and J. H. C. White as sureties are held and firmly bound unto the Rathbun-Jones Engineering Company, a corporation, in the full sum of three hundred dollars, to be paid to the said Rathbun-Jones Engineering Company, its

successors and assigns, to the payment of which well and truly to be made, we hereby bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this June 1, 1915.

Whereas, on the twenty fourth day of February, 1915, in a suit and controversy pending in said Court between Rathbun-Jones Engineering Company, as complainant, and against Peoples Light Company, Defendant, Number 5, on the equity docket of said Court, a final decree was entered therein, in which it was ordered that the mandate of the Circuit Court of Appeals for the Fifth Circuit be made the judgment of this Court, and that the Clerk of this Court, issue an order of sale as in the decree of this Court of January 9, 1914, provided, directed to the marshal of this district, commanding him to sell the property described in the judgment aforesaid, to satisfy such judgment, interest and costs, and it was further ordered that in the event said property did not sell for sufficient amount to satisfy said judgment, interest and costs, the Clerk of this Court issue execution against defendant Peoples Light Company, and against the sureties on its appeal bond herein, Clark Pease and Gust Heye, Jr., for any deficiency that might remain unpaid on said judgment, and said Clark Pease has obtained an appeal of said cause to the Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, to reverse the decree aforesaid, and the said Rathbun-Jones Engineering Company being admonished to be and appeal before the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, thirty days from and after this date.

Now, therefore the condition of the above obligation is such that if the said Clark Pease prosecute his appeal to effect, and answer all costs herein if he fail
47 to make his plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

Signed and sealed this June 1, A. D. 1915.

CLARK PEASE,
By FRANK H. BOOTH,
Counsel of record, Principal.
H. G. SHERMAN,
MYRON A. PEASE,
J. H. C. WHITE,
Sureties.

Approved this June 1, 1915.
R. W. WALKER, Circuit Judge.

I, L. C. Masterson, Clerk of the District Court of the United States for the Southern District of Texas, certify that in my opinion the sureties on the bond above mentioned are sufficient for the amount of the penalty thereof, and if the same were presented to me for approval, I would approve it.

Corpus Christi, Texas, June 1, 1915.

L. C MASTERSON,
Clerk.
By J. A. MOUNT,
Deputy.
(Seal)

Indorsed: Bond on Appeal of Clark Pease. Filed 7th day of June, 1915.

ASSIGNMENTS OF ERROR BY CLARK PEASE.

In the District Court of the United States, for the Southern District of Texas, Corpus Christi Division.

Rathbun-Jones Engineering Co.
vs. No. 5, In Equity
Peoples Light Company.

Assignments of Error by Clark Pease.

First Assignment of Error.

48 The Court erred in its order of February 24, 1915, in directing the issuance of execution against this appellant for any deficiency which might

exist after the sale of the mortgaged property, for that the appeal bond herein did not secure, and was not intended to secure the payment of the amount of the original decree, or any deficiency thereupon, but operated only as indemnity against damages and costs by reason of said appeal, and it appears that all costs on appeal have been paid.

Second Assignment of Error.

The Court erred in its order of February 24, 1915, in directing the issuance of execution against this appellant for any deficiency which might exist after the sale of the mortgaged property, for that said order was entered without pleading, without notice, and without hearing, against to or of appellant; and said order, therefore, was in violation of the Constitution of the United States, in that it deprives appellant of his property without due process of law.

Third Assignment of Error.

The Court erred in its order of February 24, 1915, in directing the issuance of execution against this appellant for any deficiency which might exist after the sale of the mortgaged property, for that if any liability rests upon appellant by reason of the bond on appeal, the same can only be enforced in an action at law on the bond, at the trial of which the issues may be inquired into by a jury; and the entry of said order was contrary to the Constitution of the United States in that it deprived appellant of the right of trial by jury in actions at common law.

Fourth Assignment of Error.

The Court erred in its order of February 24, 1915, in directing the issuance of execution against this appellant for any deficiency which might exist after the sale of the mortgaged property for that the same was not authorized by the mandate of the Circuit Court of Appeals, and is beyond the authority and direction of said mandate.

Fifth Assignment of Error.

The Court erred in entering the order of February 24, 1915, in directing the issuance of execution against appellant for any deficiency for any deficiency which might exist after the sale of the mortgaged property, for
49 that in its bill filed in this cause, the complainant sought a judgment at law, for any deficiency remaining due on said decree after the application of the proceeds of the sale of the mortgaged property, and such judgment was not awarded it; therefore the right to a deficiency judgment and execution therefor has been adjudicated against is, and such right is res adjudicata.

Sixth Assignment of Error.

The Court erred in entering said order of February 24, 1915 directing the issuance of execution against the appellant for any deficiency existing on said decree after the sale of the mortgaged property, for that the effect of said order is to amend and add to, in a material respect, the decree of January 9, 1914, and was without authority of law because the term of the Court at which it was rendered had long since adjourned, and the Court had no control over it after adjournment.

Seventh Assignment of Error.

The Court erred in entering the order of February 24, 1915, directing the issuance of execution against appellant for any deficiency existing on said decree after the sale of the mortgaged property, for that complainant's right to an execution for a deficiency being denied it, its only remedy was by appeal from said decree of January 9, 1914.

Eighth Assignment of Error.

The Court erred in entering the order of February 24, 1915, directing the issuance of execution against appellant for any deficiency existing on said decree after the sale

of the mortgaged property, for that there had not been, has not yet been, nor can there be, in this proceeding, a judicial ascertainment of the amount of such deficiency for that the Court has no control over said proceedings, except insofar as to control and prevent the abuse of its process, and to execute its valid decree, which has been done.

Ninth Assignment of Error.

The Court erred in entering the order of Fenrusry 24, 1915, directing the issuance of execution against appellant for any deficiency existing on said decree after the sale of the mortgaged property, for that at the time of the entry of said order, the Peoples Light Company, defendant, had been dissolved, and this suit, as to it, abated; and inasmuch as no execution can be issued against it, none can be issued against appellant.

Tenth Assignment of Error.

The Court erred in entering the order of February 24, 1915, directing the issuance of execution against appellant for any deficiency existing on said decree after the sale of the mortgaged property, for that the right of the plaintiff to an execution for a deficiency was adjudged against it in this cause, and there being no right to an execution against defendant, it is in no event entitled to an execution against appellant.

Eleventh Assignment of Error.

The Court erred in entering the order of February 24, 1915, directing the issuance of execution against appellant for any deficiency existing on said decree after the sale of the mortgaged property, for that the execution issued under said order is void and of no effect, because tested after the death and dissolution of the defendant Peoples Light Company.

Twelfth Assignment of Error.

The Court erred in entering the order of February 24, 1915, directing the isuuance of execution against appellant for any deficiency existing on said decree after the sale of the mortgaged property, for that the complainant herein by not appealing from the decree of January 9, 1914, elected to accept said decree as being conclusive on it, and by said election effectually estopped itself to claim the right to an execution for a deficiency which said decree did not award it.

Thirteenth Assignment of Error.

The Court erred in entering the order of February 24, 1915, directing the issuance of execution against appellant for any deficiency existing on said decree after the sale of the mortgaged property, for that by the sale of the said property, plaintiff elected to accept said decree as conclusive and binding upon it, and has effectually estopped itself to claim the right to an execution for such deficiency.

Fourteenth Assignment of Error.

The Court erred in entering the order of February 24, 1915, directing the issuance of execution against appellant for any deficiency existing on said decree after the sale of the mortgaged property for that the sale of said property operated as complete satisfaction of the decree of January 9, 1914.

51

For the reasons aforesaid, appellant prays that this cause be reversed and remanded, with such directions as to the Court may seem proper.

FRANK H. BOOTH,
Attorney for Clark Pease

Indorsed: No. 5 Equity. Rathbun-Jones Engineering Co. vs. Peoples Light Co. .... Assignment of Errors by Clark Pease..... Filed 7th day of June, 1915. L. C. Masterson, Clerk, By J. A. Mount, Deputy.

WAIVER OF ISSUANCE AND SERVICE OF CITATION.

In the United States District Court, for the Southern District of Texas.

Rathbun-Jones Engineering Co.
vs. No. 5 Equity
Peoples Light Co.

The Rathbun-Jones Engineering Company, Appellee, acting herein by its counsel of record, Terrell, Walthall & Terrell, hereby waive the issuance and service of citation on the appeal of Clark Pease from the order of February 24, 1915, and accept service thereof.

RATHBUN-JONES ENGINEERING CO.,
By TERRELL, WALTHALL & TERRELL
Its Counsel.

Indorsed: Waiver of Issuance and Service of Citation. Filed 19 day of June, 1915.

52 CLERK'S CERTIFICATE.

United States of America,
Southern District of Texas,
Corpus Christi Division.

I, L. C. MASTERSON, Clerk of the United States District Court for the Southern District of Texas, do hereby certify that the foregoing .... pages, is a true and correct Transcript, as therein stated, of the proceedings had and orders entered in cause No. 5, Equity, entitled Rathbun-Jones Engineering Company, Complainant, vs. The Peoples Light Company, Defendant, as the same appears on file and of record in this office.

I further certify that the waiver by Complainant of the issuance and service of Citation on Appeal is embraced herein at page .... of this Transcript.

Witness my official signature and seal of said District Court, at office in the City of Corpus Christi, Texas, this the 26th day of June, A. D. 1915.

L. C. MASTERSON,
Clerk.

By J. A. MOUNT.
Deputy.

(Seal)

Order Overruling Motion to Set Aside Decree on Mandate In Re Rathbun-Jones Engineering Company versus People's Light Company.

Excerpt from Transcript In Re Clark Pease et al. vs. Rathbun-Jones Engineering Co., No. 2781, U. S. Circuit Court of Appeals, Fifth Circuit.

Order on Motion of Clark Pease et al.

In the District Court of the United States for the Southern District of Texas, Corpus Christi Division.

No. 5. Equity.

RATHBUN-JONES ENGINEERING CO.
vs.
PEOPLE'S LIGHT COMPANY.

May 29, 1915.

On this day the motion and supplemental motions of Clark Pease and Elenita S. Heye, administratrix of the estate of Gust Heye, Jr., deceased, and Edward H. Eldridge, filed herein on May 6, 1915, and May 29, 1915, came on to be heard at this term of the Court, and was argued by counsel for petitioners, and complainant did not appear either in person or by counsel, although its counsel, Terrell, Walthall & Terrell, had due notice of said motion, and the time of hearing thereof, and thereupon and upon consideration thereof, and of the testimony in support thereof, it is ordered, adjudged and decreed by the Court that said motions be and the same are hereby, in all things overruled, and that complainant Rathbun-Jones Engineering Company do have and recover of and from petitioners Clark Pease, Elenita S. Heye, administratrix of the estate of Gust Heye, Jr., deceased, and Edward H. Eldridge, Trustee, all costs incurred upon said motions, for which execution may issue.

To which order and decree of the Court said petitioners in open Court excepted, and being aggrieved by said order and decree, the said petitioners in open Court prayed an appeal therefrom to the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, to the end that said order and decree may be reviewed and reversed and a decree entered in favor of said petitioners; and upon consideration thereof said appeal is hereby allowed, and said petition desiring to supersede said order and decree, the bond on appeal is fixed at the sum of sixty five hundred dollars, to be approved by the Court.

It is further ordered that the record herein be made in accordance with the Rules of Practice for the Courts of Equity for the United States, promulgated by the Supreme Court of the United States; and that so much of the record as may be necessary to de-

termine this appeal be certified to the United States Circuit Court for the Fifth Circuit, at New Orleans, Louisiana, as required by law.

W. T. BURNS, *Judge.*

Indorsed: Order on Motion of Clark Pease et al. Filed May 31, 1915.

That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of November 10th, 1915.

No. 2804.

CLARK PEASE
versus
RATHBUN-JONES ENGINEERING COMPANY.

On this day this cause was called, and, after argument by Frank H. Booth, Esq., for appellant, and James D. Walthall, Esq., for appellee, was submitted to the Court.

Opinion of the Court.

Filed December 7th, 1915.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 2781.

CLARK PEASE et al., Appellants,
vs.
RATHBUN-JONES ENGINEERING COMPANY, Appellee.

No. 2804.

CLARK PEASE, Appellant,
vs.
RATHBUN-JONES ENGINEERING COMPANY, Appellee.

No. 2834.

CLARK PEASE, Appellant,
vs.
J. A. HERRING, U. S. Marshal, and RATHBUN-JONES ENGINEERING COMPANY, Appellees.

Appeals from the District Court of the United States for the Southern District of Texas.

Frank H. Booth, for appellants.
James D. Walthall, for appellees.

Before Pardee and Walker, Circuit Judges, and Speer, District Judge.

WALKER, *Circuit Judge:*

By a decree rendered on January 9, 1914, in the case of Rathbun-Jones Engineering Company versus People's Light Company, it was adjudged that "plaintiff do have and recover of and from the defendant * * * the sum of six thousand, eight hundred and four dollars and ninety cents ($8.804.90)," and also interest and costs. The decree further provided for the establishment of a lien on certain described machinery, as claimed in the petition, and that if the amount decreed against the defendant was not paid within sixty days from the date of the decree the clerk issue process directing the marshal to sell the property subjected to the lien. An appeal was taken from this decree, and a bond in the sum of $7,500, dated March 7, 1914, and with the condition that "if the said People's Light Company shall prosecute its appeal to effect, and answer all damages and costs if it fails to make its plea good," was made and approved, Clark Pease and Gust. Heye, Jr., signing as sureties. The result of that appeal was an affirmance by this court of the decree appealed from. People's Light Company vs. Rathbun-Jones Engineering Company, 218 Fed. 167. On February 24, 1915, after the filing of the mandate from this court, the District Court entered a decree which ordered that the mandate be made the judgment of the court, and further ordered "that the Clerk of this court issue an order of sale as in the decree of this court provided, directed to the Marshal of this district, commanding him to sell the property described in the judgment rendered herein to satisfy said judgment, interest and costs, and it is further ordered that in the event said property does not sell for sufficient amount to satisfy said judgment, interests and costs, the Clerk of this court issue execution against the defendant and against the sureties on the appeal bond herein, Clark Pease and Gust. Heye, Jr., for any deficiency that may remain." Thereafter, on May 6, 1915, after the Marshal's sale of the property decreed subject to the lien declared, and the application of the sum realized on that sale—$1500—to the satisfaction to that extent of the decree, Clark Pease and the administratrix of the estate of Gust. Heye, Jr., deceased, filed a motion in the cause, which, after stating the proceedings therein, prayed that the above mentioned order of February 24, 1915, in so far as it directs the issuance of execution against the People's Light Company and against Clark Pease and Gust. Heye, Jr., be set aside and held for naught. The motion stated many grounds for the granting of the relief sought. One of the grounds was: "That said order was entered by the court without pleading, without notice and without hearing, against, to or of these petitioners or either of them. And said order is in violation of the Constitution of the United States in that it deprives your petitioners of their property without due process of law." Among other grounds stated in the motion were the following:

"That said bond did not secure, and was not intended to secure

the payment of the amount of said judgment or any deficiency that might remain after the application of the proceeds of the sale of said property, but operated only as indemnity against damages and costs by reason of said appeal; and, in this connection, petitioners show that all the costs on said appeal and adjudged against them by the Circuit Court of Appeals have been paid, and attach the receipt of the Clerk of this court hereto to show the fact."

"That in its bill filed in this cause, the complainant sought a judgment, as at law, for any deficiency that might remain due on said judgment after the application of the proceeds of the sale of said mortgaged property, and such judgment was not awarded it; and, therefore, its right to a deficiency judgment and execution therefor, has been adjudicated against it, and such right, if it ever existed, is res adjudicata, which these petitioners now here plead in bar of any right of the plaintiff to have execution for such deficiency."

"That the sale of said property, and the acceptance of the proceeds thereof, operated as a complete satisfaction of the decree aforesaid, and no cause of action now exists, if any ever existed, against your petitioners or either of them."

The case is here on separate appeals sued out from, respectively, the decree of February 24, 1915, from the decree overruling the above-mentioned motion, and from a decree overruling an application of Clark Pease for an injunction restraining the enforcement of the execution against him. No stay of the execution having been ordered before the hearing in this court on the last mentioned appeal, Clark Pease, under protest, paid the amount called for by the execution against him.

It may be assumed that a surety on the supersedeas bond had the right to have the question of his liability thereunder adjudicated in an action at law on the bond in which he could have claimed a trial by jury. If he had this right, it was one he could waive by voluntarily submitting the question as to his liability to the court which rendered the decree on the appeal from which the bond was given. That court could, at the request or with the consent of the surety, determine the liability on a bond which was part of the proceedings in a case which was or had been pending before it. Several of the grounds stated in the motion made by the sureties distinctly invoke a ruling by the court on the question of the liability incurred by the sureties under the facts of the case. The court was invited to pass on the merits of the question, including matters which were set up as barring the asserted right of the plaintiff in the case to have a recovery against the sureties. One against whom a liability is asserted in one court waives a special privilege he may have to require that another court be resorted to for the adjudication of the question of such liability by appearing in the court in which the liability has been asserted and invoking a decision of that court on the merits of the controversy; and such waiver results from such conduct though the submission of the controversy to that court for its decision is accompanied by the suggestion that that court had not acquired jurisdiction of the person so appearing in it. One so making a general appearance in a court and invoking its decision

as to the merits of a claim made against him cannot so limit or qualify the effect of his appearance as to retain the right of electing to abide by the decision if it is acceptable to him or of not being bound by it if it is adverse to his contention. St. Louis & San Francisco Railway Company v. McBride, 141 U. S. 127; 24 Cyc. 156, 158. It follows that the surety cannot sustain a complaint against a ruling as to his liability which was made at his instance, if what he was required to pay as a result of the ruling as no more than the bond made him liable for.

For an appeal to operate as a supersedeas and to stay execution, there must be taken "good and sufficient security that * * * the appellant shall prosecute * * * his appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs." U. S. Rev. Stat., §1000; Rule XIII of this court. The bond in question was conditioned as required by the quoted provision of the statute. The decree which was so superseded was one for the payment of money. The breach of the condition of such a bond given in such a case entitled the obligee to recover not only compensation for the delay arising from the appeal, but also the amount of the decree appealed from, so far as the latter directs the payment of money by the appellant to the appellee. American Surety Company of New York v. North Packing & Provision Company, 178 Fed. 810; Wood v. Brown, 104 Fed. 203. The ruling made in the case of Kountze v. Omaha Hotel Company, 107 U. S. 378, is not applicable here. The bond under consideration in that case was given on an appeal from an ordinary foreclosure decree. It was distinctly pointed out in the opinion rendered in that case (page 393) that the decree appealed from was not a personal one for the debt which the mortgage secured, and that the personal liability of the debtor could have been enforced while the appeal from the foreclosure decree was pending. Not so here, where the effect of the bond under consideration was to suprsede the decree as a whole, not merely the part of it which decreed a sale of the property found to be subject to a lien, but the part of it which ordered the payment of money by the appellant to the appellee. Nothing contained in Rule XIII of this court can be given such effect as to prevent the bond standing as security for the superseded decree for the payment of money, at least in so far as that decree is not otherwise secured. The provision of that rule that "such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and cost and interest on appeal," by no means has the effect of preventing a bond which superseded such a decree as the one under consideration, which was for the payment of money and also for a lien on property ordered to be sold and the proceeds applied on the decree, standing as security for the decree for money so far as it remained unsatisfied after the application of the proceeds of the property ordered to be sold. That rule undertakes to furnish a guide for determining the amount of supersedeas bonds in specified cases, and shows that the amount is to be more or less according as the appellee or defendant in error may be liable to be subjected to

more or less damage by the superseding or suspension of the execution of the decree or judgment in his favor; but certainly it does not undertake to deprive a supersedeas bond in any case of the effect given to it by the statute of subjecting the principal and sureties to liability "for all damages and costs" which the appellee or the defendant in error may sustain if the appellant or plaintiff in error "fail to make his plea good." The liability on a bond which operated to suspend such a decree as the one under consideration would not extend to "all Damages" if it did not cover so much of the decree for the payment of money as was left unsatisfied after the application to the decree of the amount realized on the sale of property subjected to a lien and ordered to be sold. There is nothing for the surety to complain of in the fact that, before his liability was sought to be enforced, the amount of the decree which had been superseded was reduced by the application to it of the amount realized on the sale of the property decreed to be sold.

The jurisdiction of the court was not exhausted by the rendition of the decree in question, but continued until the decree was satisfied, except in so far as its right to exercise its power to enforce the decree was suspended during the pendency of the appeal. Wayman v. Southard, 10 Wheat. 1, 23; Riggs v. Johnson County, 6 Wall. 166, 187; Central National Bank v. Stevens, 169 U. S. 432, 464. The part of the decree which remained unsatisfied after the execution of the part of it which decreed the sale of property and the application of the proceeds of the sale was "solely for the payment of money." The appropriate final process for the execution of the decree so far as it remained unexecuted when the order complained of was made was such a writ of execution against the defendant as the motion sought to forbid the enforcement of. Equity Rule 8. A part of the command of the mandate issued from this court to the trial court upon the affirmance of the latter's decree was: "You, therefore, are hereby commanded that such execution and further proceedings be had in said cause as according to right and justice and the laws of the United States, ought to be had, the said writ of error (appeal?) notwithstanding." Plainly it was competent for the court to issue against the defendant in the cause such an execution as was issued. And the surety's submission to the court of the question as to his liability on the supersedeas bond conferred on the court the right to decide the question and to provide for the enforcement of its decision by proper process. As at the time that decision was rendered the unexecuted part of the decree which had been superseded was "solely for the payment of money," and as it was for that amount only that execution against the surety was allowed to be enforced, the decree having already been satisfied in part by the application of the proceeds of the sale of the property subjected to a lien and ordered to be sold, the result of what the court did was to allow the execution of appropriate process against the surety to be proceeded with to the end of coercing the payment by him of no more than the amount which the supersedeas bond obligated him to pay. A surety on the bond cannot sustain a complaint against action of the court having this effect only. It follows that the de-

crees presented for review by the two appeals first above mentioned as now pending are affirmed. The satisfaction of the execution, the injunction of the enforcement of which was the sole relief sought in the case in which was rendered the other decree which was appealed from, leaves nothing for decision on that appeal; and that appeal is dismissed.

Judgment.

Extract from the Minutes of December 7th, 1915.

No. 2804.

CLARK PEASE
versus
RATHBUN-JONES ENGINEERING COMPANY.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause, be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellant, Clark Pease, and the sureties on the appeal bond herein, H. G. Sherman, Myron A. Pease, and J. H. C. White, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of said District Court.

Petition for Rehearing.

Filed December 24, 1915.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2781.

CLARK PEASE et al., Appellants,
versus
RATHBUN-JONES ENGINEERING COMPANY, Appellee.

No. 2804.

CLARK PEASE, Appellant,
v.
RATHBUN-JONES ENGINEERING COMPANY, Appellee.

CLARK PEASE, Appellant,
versus
J. A. HERRING, U. S. Marshal, and RATHBUN-JONES ENGINEERING COMPANY, Appellees.

Petition for Rehearing.

To the Court:

Now comes Clark Pease, Elenita S. Heye, administratrix of the estate of Gust Heye, Jr., deceased, and Edward H. Eldridge, trustee,

appellants, and file this their petition for a rehearing, and move the court to set aside the judgment and decree heretofore entered in these causes affirming the decrees of the trial court, and to grant them a rehearing and reverse the decrees below, for the following reasons, to-wit:

1. The court erred in holding and deciding that the trial court committed no error in its decree of February 24, 1915, in directing the issuance of execution against the appellants for any deficiency which might exist after the sale of the mortgaged property, for that said order was entered without pleading, without notice and without hearing against, to, or of appellants; and said order, therefore, was in violation of the Constitution of the United States, in that it deprives appellants of their property without due process of law.

2. The court erred in holding and deciding that appellants, by filing motions to vacate the decree of February 24, 1915, thereby submitted to the jurisdiction of the court and could sustain no complaint against the rendition of the former decree, because, first, the motions were filed long after the decree of February 24, 1915, and the appearance to vacate said decree could not give effect to or validate it, for it was void. The execution issued under the decree of February 24, 1915, and not under the decree denying the motions to vacate it; second, the decree of February 24, 1915, was admittedly of no validity when rendered, and could not be vitalized by any subsequent action of the court; third, no attempt was made by the court below to validate, to any extent, the decree of February 24, 1915; fourth, the issue raised by the motion was the validity and regularity of the previous decree; fifth, even if the court in denying the motion had entered a new decree against the sureties on the bond, such decree would have been void because there was no pleading to sustain it; sixth, in no event can the decree denying the motions be given the effect of a judgment against the sureties on the bond, because a judgment void cannot be made valid; seventh, no pleading was filed by Rathbun-Jones Engineering Company, before or after the appearance of appellants, and appellants have never been called upon to answer any liability, nor had an opportunity to do so.

3. The court erred in not holding and deciding that the trial court erred in the decree of February 24, 1915, in directing the issuance of execution against appellant for any deficiency which might exist after the sale of the mortgaged property, for that the appeal bond, given on the former appeal, did not secure, and was not intended to secure, the payment of the amount of the original decree, or any deficiency thereupon, but operated only as indemnity against damages and costs by reason of the appeal, and it appears that all costs of appeal have been paid.

The error here results from the fact that no decree for deficiency could be entered—that is, no decree for the payment of money which would support an execution, until after the sale of the mortgaged property. The court of equity had not the power; and could enter such a decree only pursuant to, and in conformity with, Rule 10, after the sale. The court did not have the power to provide for the

existence of a deficiency in the original decree, and if such had been attempted, it would be, to that extent, a mere nullity; from which it follows that no personal decree was entered.

Appellants ask the court to consider the argument on this motion filed separately.

Appellants respectfully petition the court for a rehearing and pray that the former judgment of the court be set aside, the cases reversed for further proceedings in the trial court as justice and right require.

(Signed) FRANK H. BOOTH,
Counsel for Appellants.

Order Denying Rehearing.

Extract from the Minutes of January 4, 1916.

No. 2804.

CLARK PEASE
versus
RATHBUN-JONES ENGINEERING COMPANY.

Ordered that the petition for rehearing filed in this cause, be, and the same is hereby, denied.

Præcipe for Transcript.

Filed January 14th, 1916.

In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 2804.

CLARK PEASE, Appellant,
vs.
RATHBUN-JONES ENGINEERING CO., Appellee.

Appellant's Præcipe.

Mr. Frank H. Mortimer, Clerk U. S. Circuit Court of Appeals, New Orleans, La.

DEAR SIR: Please prepare and certify in accordance with the rules of court a transcript of the record in the above styled and numbered cause, to be used as an exhibit to an application to the Supreme Court for a writ of certiorari, and incorporate in said transcript the following:

1. The printed record of proceedings had in the trial court.

1a. Order overruling motion to set aside decree on mandate. (On record in No. 2781, pages 76-77.)

2. Argument and submission in the Circuit Court of Appeals.

3. Opinion of the Circuit Court of Appeals.
4. The judgment of the Circuit Court of Appeals.
5. Proof of service of præcipe.
6. Clerk's certificate.

Yours very truly,
(Signed) FRANK H. BOOTH.

(Waiver on next page.)

We, Terrell, Walthall & Terrell, attorneys for appellee in the above styled and numbered cause, acknowledge receipt of a copy of the above præcipe of the contents of the record to be used on application for certiorari.

(Signed) TERRELL, WALTHALL & TERRELL,
Attorneys for Appellee.

January 8, 1916.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 58 to 74 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2804, wherein Clark Pease is appellant, and Rathbun-Jones Engineering Company is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the Order overruling Motion to set aside Decree on Mandate, copied at page 57 of the foregoing record, as directed in the Præcipe of Petitioner, is a true, complete and correct copy as the same appears in the transcript in cause No. 2781, Clark Pease et al., appellants, versus Rathbun-Jones Engineering Company, appellee;

I further certify that the pages of the printed record from 1 to 56 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 15th day of January, A. D. 1916.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 2804.

CLARK PEASE, Appellant,
versus
RATHBUN-JONES ENGINEERING COMPANY, Appellee.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the annexed writ of certiorari, I now hereby certify that, on the 11th day of March, A. D. 1916, there was filed in my office a stipulation in the above entitled case in the following words, to-wit:

"In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 2804.

CLARK PEASE, Appellant,
vs.
RATHBUN-JONES ENGINEERING COMPANY, Appellee.

It is agreed by the parties hereto, Appellant and Appellee, by their respective counsel, that the certified transcript of the record accompanying the petition of Appellant to the Supreme Court for a writ of certiorari, may be taken and treated as a return to the writ of certiorari issued by the said Supreme Court.

(Signed) FRANK H. BOOTH,
Counsel for Appellant.

(Signed) TERRELL, WALTHALL & TERRELL,
Counsel for Appellee.

San Antonio, Texas, March 1, 1916."

I further certify that the above is a true and correct copy of said stipulation, and of the whole thereof.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 11th day of March, A. D. 1916.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Clark Pease is appellant, and Rathbun-Jones Engineering Company is appellee, No. 2804, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of Texas, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the second day of March, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 25,103. Supreme Court of the United States, October Term, 1915. No. 820. Clark Pease vs. Rathbun-Jones Engineering Company. Writ of Certiorari. In the United States Circuit Court of Appeals, Fifth Circuit. Filed 11 day of March 1916. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

[Endorsed:] 820/25103. No. 2804. United States Circuit Court of Appeals for the Fifth Circuit. Clark Pease, Appellant, vs. Ratbun-Jones Engineering Compan-, Appellee. Writ of Certiorari and return thereto.

[Endorsed:] File No. 25,103. Supreme Court U. S., October term, 1915. Term No. 820. Clark Pease, Appellant, vs. Rathbun-Jones Engineering Company. Writ of certiorari and return. Filed March 13, 1916.

No._____

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1915.

CLARK PEASE, PETITIONER,

versus

RATHBUN-JONES ENGINEERING COMPANY,
RESPONDENT.

Petition for Writ of Certiorari.

To the Circuit Court of Appeals, for the Fifth Circuit, to bring before this Honorable Court Cause No. 2804, therein pending of Clark Pease, Appellant, vs. Rathbun-Jones Engineering Co., Appellee.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Clark Pease, is a citizen of resident of the Southern District of the State of Texas, and respondent, Rathbun-Jones Engineering Company, is a corporation organized under the laws of the State of Ohio and is a citizen of said State; that at the time of the origin of

this controversy, the Peoples Light Company was a corporation organized under the laws of the State of Texas, and was a citizen of said State.

That the jurisdiction of the District Court of the United States for the Southern District of Texas of the cause styled "Rathbun-Jones Engineering Company, Complainant, vs. Peoples Light Company, Defendant," in which suit the controversy here presented originated, was invoked solely on the ground of diversity of citizenship (Trans., pp. 4-5), and, therefore, the judgment of the Circuit Court of Appeals is by statute made final.

The controversy here grows out of proceedings had in the United States District Court for the Southern District of Texas, upon the return of the mandate of the Circuit Court of Appeals for the Fifth Circuit, sent down after affirmance of the case of Peoples Light Company, Appellant vs. Rathbun-Jones Engineering Company, Appellee, and of the proceedings had in the Circuit Court of Appeals for the Fifth Circuit on an appeal to that court from the proceedings aforesaid in the District Court.

The following is a brief history of the proceedings:

The suit was instituted by Rathbun-Jones Engineering Company against the Peoples Light Company, the plaintiff alleging, in substance, that on or about the 9th day of August, 1909, it had made and entered into a contract with the defendant whereby it contracted to sell and deliver to the defendant certain machinery, particularly described, for the sum of $14,000.00; that the machinery was delivered as contracted and that there remained unpaid on the purchase price $5360.35, and claiming a further indebtedness of $216.79. The plaintiff alleged that said contract had been duly filed in the office of the County Clerk of the county, and constituted a valid and subsisting mortgage lien on the property described. There was a balance due plaintiff of $5,360.35. Plaintiff

prayed a pecuniary decree against the defendant for the amounts stated, and that the same be declared a lien upon all the aforesaid property, and that the lien be foreclosed and the property sold for the payment of the debt, interest and costs, and if thereby a sufficient amount was not realized for the purpose of paying the same in full, that it have a writ of *fieri facias* for the balance to be levied upon the goods and chattels, lands and tenements of the defendant. The bill is in the Record at pp. 4-22.

The defendant answered, setting up defenses not material, except to the extent that the defendant denied and controverted the right of plaintiff to have any relief against it, either by way of pecuniary decree, foreclosure of lien or execution.

The trial of the case on January 9, 1914, resulted in a decree in favor of the plaintiff,

> "That plaintiff do have and recover of and from the defendant, the sum of five thousand, five hundred and sixty-seven dollars and fourteen ($5,567.14) cents together with interest thereon at the rate of 6 per cent per annum from and after March 1, 1910, amounting to the sum of one thousand, two hundred thirty-seven and seventy-six ($1,237.76) cents, aggregating the sum of six thousand, eight hundred and four and ninety ($6804.90) cents."

It was further ordered that the lien of plaintiff be established and foreclosed, and if the judgment was not paid within sixty days, an order of sale should issue directed to the marshal commanding him to sell the property therein described to satisfy the judgment. (Trans., pp. 23-24).

There was an appeal by the defendant, and the execution of a supersedeas bond, with Clark Pease and Gust Heye, Jr., as sureties, and conditioned as follows:

> "Now, therefore, the condition of the above obligation is such that if the said Peoples Light Com-

> pany shall prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void, otherwise to remain in full force and virtue." (Trans., pp. 26-28).

The decree of the District Court was affirmed, and the mandate there filed January 20, 1915. The mandate ordered execution against the sureties on the bond for costs incurred on appeal. (Trans., p. 28).

February 24, 1915, the District Judge entered a decree on the mandate in which it was ordered that the mortgaged property be sold and that

> "in the event said property does not sell for sufficient to satisfy said judgment, interest and cost, the clerk of this court issue execution against the defendant *and against the sureties on the appeal bond herein*, Clark Pease and Gust Heye *for any deficiency that may remain.*" (Trans., p. 32).

This decree (which will be referred to as the decree "on mandate") was rendered without pleading, and without notice to the defendant or the sureties on the appeal bond, and without giving them an opportunity to appear and defend against the rendition of any judgment against them for the deficiency or on the bond.

In the meantime (January 27, 1915) the Peoples Light Company, which was a corporation, had been dissolved in the manner provided by the laws of the State of Texas (Trans., p. 42), and Gust Heye, Jr., one of the sureties, had died on or about April 2, 1914, and Elenita S. Heye, had been appointed administratrix of his estate by the County Court of Nueces County, Texas. (Trans., p. 38).

From the decree on the mandate your petitioner prosecuted an appeal to the United States Circuit Court of Appeals for the Fifth Circuit (Trans., p. 44), where the decree of the trial court was affirmed, December 7, 1915.

In the Circuit Court of Appeals, petitioner assigned various errors, but for the purpose of this petition, it is only necessary to refer to three of them. These were:

1. That the decree on the mandate was rendered "without pleading, without notice and without hearing against, to or of appellant; and said order, therefore was in violation of the Constitution of the United States, in that it deprives appellant of his property without due process of law." (Trans., p. 51).

2. That if petitioner was liable on the bond recovery could only be had in an action at law on the bond at which a jury trial might be had and the rendition of said decree "was contrary to the Constitution of the United States in that it deprives appellant of the right of trial by jury in actions at common law." (Trans., p. 51).

3. That the supersedeas bond given on appeal from a decree of foreclosure operates only as indemnity against damages and costs by reason of the appeal, and does not operate to secure the payment of the amount of the decree or any deficiency that may remain after the application of the proceeds of the sale of the foreclosed property. (Trans., pp. 50-51).

These assignments of error were overruled by the Circuit Court of Appeals.

It appears from the Record (pages 32-36) and opinion of the court that the property was sold by the marshal for $1500.00,—the original decree being for $6804.90, and interest,—and thereupon your petitioner and Elenita S. Heye, administratrix of the estate of Gust Heye, Jr., deceased, filed a motion in the cause and "prayed that the above mentioned order of February 24, 1915, in so far as it directs the issuance of execution against the Peoples Light Company and against Clark Pease and Gust Heye, Jr., be set aside and held for naught." This motion was overruled by

the court and there was an appeal from that order. (No. 2781).

It also appears from the opinion that there was an appeal "from a decree overruling an application of Clark Pease (petitioner) for an injunction restraining the enforcement of the execution against him." This is No. 2834, styled at the beginning of the opinion.

Application has been made to the judges of the Circuit Court of Appeals for the allowance of an appeal in No. 2781.

The Circuit Court of Appeals decided the three cases together,—writing but one opinion which is included in the record here.

The decision of that court on the points hereinabove mentioned was: The court "assumed," and we think that involved a decision, "that a surety on the supersedeas bond had the right to have the question of his liability thereunder adjudicated in an action at law on the bond in which he could have claimed a trial by jury." Notwithstanding this, however, the court decided that in seeking, by the motion filed, to vacate the decree on the mandate, petitioner waived the right of trial by jury, and waived the objection that the decree on the mandate was contrary to the constitution and not due process of law.

It was further decided that the sureties on the bond were liable for the deficiency on the foreclosure decree.

The writ of certiorari should issue herein for the following reasons:

1. The questions involve an application of the Constitution of the United States in two particulars.

2. The decision of the Circuit Court of Appeals is, in its application of the law, contrary to, and in conflict with the decision of this Court in Windsor vs. United States, 11 Wall 259, Galpin vs. Page, 18 Wall, 350; Windsor vs. McVeigh, 93 U. S., 274; Wetmore vs. Korrick, 205 U. S., 141;

Hovey vs. Elliott, 167 U. S., 284 and Reynolds vs. Stockton, 140 U. S., 254, on the questions of the necessity of pleading and notice before judgment as prerequisite to due process of law.

3. The decision of the Circuit Court of Appeals on the question of liability of sureties on a supersedeas bond in a foreclosure case, is in conflict with the decision of this court in Kountze vs. Omaha Hotel Co., 107 U. S., 378, with the decision of the Circuit Court of Appeals in Louisville, etc. Ry. Co. vs. Pope, 74 Fed., 1, and the decision of the Circuit Court in Dexter Horton & Co. vs. Sayward, 79 Fed., 237.

Your petitioner believes that the aforesaid decree of the District Court and of the Circuit Court of Appeals affirming the same, are erroneous, and this Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such cases made and provided.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled "Clark Pease, Appellant vs. Rathbun-Jones Engineering Company, Appellee" No. 2804, to the end that the said case may be reviewed and determined by this court as provided in section 6 of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity

with the said act, and that the said decree of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

PERRY J. LEWIS,
Counsel for Petitioner.

FRANK H. BOOTH,
of Counsel.

BRIEF AND ARGUMENT.

The propositions and authorities upon which petitioner relies for the granting of the writ of certiorari are:

PROPOSITION.

A judgment or decree of a court against one not a party to the proceeding and without pleading against him, without service of process or notice and an opportunity to be heard, is not due process of law, and is void for want of jurisdiction.

AUTHORITIES.

Windsor vs. United States, 11 Wall, 259.
Windsor vs. McVeigh, 93 U. S., 274.
Wetmore vs. Karrick, 205 U. S., 141.
Reynolds vs. Stockton, 140 U. S., 254.
Hovey vs. Elliott, 167 U. S., 284.
Galpin vs. Page, 18 Wall, 350.

PROPOSITION.

Even though it be true that by signing an appeal bond one makes himself so far a party to the litigation as to subject himself to the jurisdiction of the court yet he does not thereby surrender his right to be heard, and if judgment is taken against him without pleading, notice or opportunity to be heard, it is void, unless a statute authorizes it. (Halsey vs. Murray, 112 Ala., 185; Offerman vs. Waycross, 112 Ga., 610; Waysman vs. Updengraff, 1 Kan., 516; Stephens vs. Miller, 3 Ky. L., 523; Booth vs. Badford, 57 Mich, 357; Miller vs. Fralich, 31 Mich., 431; Miller vs. Hogeboom, 56 Neb., 434; Ex Parte Miller, 1 Yerg., 435; Blair vs. Sanborn, 82 Texas, 686; Burck vs. Burroughs, 64 Texas, 445).

Whether the trial court may enter judgment on an appeal bond against sureties, without a trial at law at which a jury may be called, depends upon the provisions of the

statute or rule of court authorized by legislative enactment. (Harriott vs. Ballon, 9 Pet., 156). There is no statute of the United States or rule of court or decision authorizing summary judgment against sureties on appeal bonds without notice.

PROPOSITION.

The cause of action of the appellee on a bond given in an appeal from a foreclosure decree against sureties on the bond, is essentially legal in its nature and may be asserted only in a court of law; and the attempted exercise of jurisdiction by a court of equity, and the consequent denial of the right of trial by jury, is contrary to the Constitution of the United States.

AUTHORITIES.

Encl. U. S. Reports, pp. 754-755.
Kountze vs. Ohama Hotel Co., 107 U. S., 378.
Harriot vs. Ballon, 9 Pet., 156.
Baylis vs. Travelers Ins. Co., 113 U. S., 316.
Hodges vs. Eason, 106 U. S., 408.

PROPOSITION.

A supersedeas bond given on appeal from a decree of foreclosure operates only as indemnity against damages by reason of the appeal, and does not operate to secure the payment of the amount of the decree or any deficiency that may remain after the application of the proceeds of the property adjudged as security therefor.

AUTHORITIES.

Supreme Court Rule 29.
Omaha Hotel Co. vs. Kountze, 107 U. S., 378.
Crane vs. Buckley, 203 U. S., 443.
Louisville, etc. Ry. vs. Pope, 74 Fed., 1.

Dexter, Horton & Co. vs. Sayward, 79 Fed., 237.
The Sydney, 47 Fed., 261.
2 Cyc., 952, and note.

PROPOSITION.

At the time of the rendition of the decree on the mandate there had not been a judicial ascertainment of the fact or amount of the deficiency, and, therefore, the decree was void.

AUTHORITIES.

Jones on Mortgages, Sec. 1709.
Carr vs. Lindler, 18 S. E., 636.
Bank of Rochester vs. Emmerson, 10 Paige, 359.
Baird vs. McConkey, 20 Wis., 297.
Rache vs. Dorcher, 44 N. Y. Sup. Ct., 150.
Tormey vs. Garhart, 41 Wis., 54.
Mickle vs. Mayfield, 42 Mich., 304.
Crowley vs. Harader, 69 Ia., 83.
Hill vs. Young, 8 S. E., 938.
Presley vs. McLean, 80 Ala., 309.
Winston vs. Browning, 61 Ala., 80.
Sayre vs. Elyton, 73 Ala., 85.
Clapp vs. Maxwell, 13 Neb., 542.
Cobb vs. Thornton, 8 How. Pr., 66.
Moore vs. Shaw, 15 Hun., 428.
Hastings vs. Alabama, etc. Co., 124 Ala., 608.
27 Cyc., 756.

PROPOSITION.

Equity Rule 10 authorizes the court to render a deficiency decree in a foreclosure case only after a sale of the mortgaged property.

In the absence of that rule, the Federal Courts of equity have not power to render a deficiency decree in such a suit.

(Noonan vs. Bradley, 2 Black, 499; Kountze vs. Omaha Hotel Co., 107 U. S., 378).

The very authority to render a decree "for any balance that may be found due to the plaintiff" implies a sale of the mortgage property before the power conferred by the rule may be exercised.

It follows, therefore, that no valid decree could be entered against the defendant for the deficiency in this case, at the time it was rendered, and in consequence no valid decree could be rendered against the sureties, even though they be liable.

PROPOSITION.

The complainant in the original suit (Appellee) having sought a judgment as at law for any deficiency that might remain due on the decree of foreclosure after applying the proceeds of the sale of the mortgaged property, and such relief not being awarded it in the decree entered (without reserving the case for further orders), its right thereto was *res adjudicata.*

AUTHORITIES.

Kingsbury vs. Buckner, 134 U. S., 650.
Sibbald vs. United States, 12 Pet., 88.
Durant vs. Essex County, 101 U. S., 555.

The decree of foreclosure neither awarded a deficiency, nor did the court retain control of the case for further orders (Trans., p. 23), and therefore,

PROPOSITION.

The direction of the decree on the mandate that execution issue against the defendant, and the sureties, was unauthorized for it was a material change in and addition to the foreclosure decree, and the term at which that decree was entered having adjourned, the trial court had no con-

trol over it, and could neither add to nor take from the rights of the parties as there fixed.

AUTHORITIES.

Sibbald vs. United States, 12 Pet., 88.
Durant vs. Essex County, 101 U. S., 555.
In re Washington, etc. Ry., 140 U. S., 91.
In re Potts, 166 U. S., 263.
In re Sawyer, 21 Wall., 617.

PROPOSITION.

The failure to award complainant, in a foreclosure case, a decree for a deficiency, is a judicial error, and may, after the adjournment of the term, be corrected only by appeal.

AUTHORITIES.

Leavenworth vs. C. R. I. & P. Ry., 134 U. S., 688.
Putnam vs. Day, 22 Wall, 60.
Phillips vs. Negley, 117 U. S., 665.
Bronson vs. Schulten, 104 U. S., 418.
Barron vs. Kenedy, 17 Cal., 574.

The latter case, directly on the point, was decided by Mr. Justice Field.

PROPOSITION.

The dissolution of the Peoples Light Company abated the suit against it, and the deficiency decree was therefore void.

Pendleton vs. Russell, 144 U. S., 640.

ARGUMENT.

JUDGMENT WITHOUT PLEADING AND NOTICE.

The doctrine announced and applied by the Circuit Court of Appeals undermines the first principles of our jurispru-

dence. It finds no sanction in the decisions of this court. It finds no sanction in the decisions of any other court. It is in conflict with decisions of this court. If permanently engrafted into the body of the law, it sets at naught the most cherished rights vouchsafed to the citizen by the Constitution,—that his property shall not be taken without due process of law, and the right of trial by jury.

The case, very briefly stated, is this: Petitioner was one of the sureties on a supersedeas bond given on an appeal from a decree foreclosing a mortgage. That decree was affirmed, with costs of appeal against the sureties. Upon the return of the mandate, and prior to the sale of the mortgaged property, the District Court, without pleading upon which to base its judgment, without notice to petitioner, without opportunity of a hearing, rendered a decree for an execution against him for any deficiency remaining due on the foreclosure decree after applying the proceeds of the sale of the mortgaged property. The court proceeded *ex parte*, by a voluntary assumption and exertion of the judicial power, and in consequence of that exertion, petitioner has been required to pay a judgment so rendered, of more than $6,000.00. An appeal is prosecuted from that decree, and it is affirmed. The case is now here.

And the proceeding is justified upon what ground? That petitioner sought by application to the trial court, and to the appellate court, to vacate the decree on the mandate!

This court has steadfastly set its face against a proceeding of this character. "It would be contrary to the first principles of the social compact and of the right administration of justice." (Windsor vs. McVeigh, 11 Wall, 259). Of this the court subsequently said:

> "The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, there he may defend, for the lia-

bility and the right are inseparable. This is a principle of natural justice recognized by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. * * * * It is difficult to speak of such a decree with moderation, it was in fact a mere arbitrary edict clothed in the form of a judicial sentence."—(Windsor vs. McVeigh, 93 U. S., 277).

"This language but expresses the most elementary conception of the judicial function." (Hovey vs. Elliott, 167 U. S., 284).

"Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered." (Galpin vs. Page, 18 Wall, 350).

In the cases cited there was a pretense of giving notice and hearing, and proceedings had *after appearance*. There was no pretense of notice and hearing in this case. No pleading upon which a decree could be rendered. If there ever was an "arbitrary edict clothed in the form of a judicial sentence" it is now before the court.

And one which finds its *justification* in the fact that the aggrieved party sought relief against it,—a decision less defensible cannot be found.

The sale of the mortgaged property was delayed by appellee until after the time for supersedeas elapsed. Until there was a sale and ascertainment of the deficiency, it could not be known that any injury would result to petitioner from the order; hence, in his appeal here, no supersedeas could be had,—because of the conduct of appellee in delaying the sale. And this, it is decided, effectually cuts him off.

The opinion discloses that there was an appeal by petitioner from the decree on the mandate (No. 2804), which is this case; petitioner sought by motion in the trial court, to vacate the decree on the mandate and this being denied he appealed (No. 2781); that after levy of the execution issued under the decree on the mandate he sought, by bill, to enjoin the sale, and the injunction being denied, he appealed, (No. 2834), and pending these appeals, petitioner, under protest, paid the amount of the decree. The record in No. 2781, here on appeal, discloses that he resorted to all available means to prevent this, by application for supersedeas and stay of proceedings, both to the trial court and the appellate court. What more could he do to protect himself?

The appellate court "assumed" the correctness of petitioner's position on the points raised as to the validity of the decree, in the light of the provisions of the constitution respecting due process of law and right of jury but decided, notwithstanding, that by filing the motion in the trial court to vacate the decree, petitioner thereby "voluntarily submitted the question of his liability to the court which rendered the decree," and in consequence waived the questions which thus effected the absolute invalidity of the decree on the mandate. The court further decided that petitioner "invited," the court "to pass on the merits of the question," and "elected to abide by the decision." But, the complete answer to all this is, that the trial court, in denying the motion to vacate the decree, did not attempt to fix the liability of the petitioner on the bond. The only effect of denying the motion was to adjudge the validity and regularity of the previous decree.

The principle that one who makes a general appearance in a court and invokes its decision as to the merits of a claim against him, cannot limit or qualify the effect of his appearance and is bound by the decree against him, is elementary. But it has no application here. It is true that if

petitioner had submitted to, without appeal from, the decree denying the motion, his right to question the validity of the decree on the mandate in a subsequent proceeding, would be gone; the question would be *res adjudicata*, for the reason that by denying the motion the trial court adjudged that the decree sought to be vacated was *valid*. It is impossible, however for it, logically, to be held that the rule applies here. This is an appeal direct from the decree on the mandate, and raises, to the same extent as would an original bill, the question of whether the decree on the mandate was valid,—whether it was due process of law, and whether petitioner in the first instance had been denied the right of trial by jury.

The error of the court, in the application of the principle involved, lies in the fact that *after the court acquired jurisdiction*, by the appearance by motion, it did not attempt to "decide the question and provide for the enforcement of its decree by proper process." The opinion discloses that the motion sought to vacate the decree on the mandate, and there was an appeal "from the decree overruling the abovementioned motion." (Opinion, p. 4).

A case might have been made in the trial court which called for an application of the principle relied upon by the Court of Appeals. Undeniably, the sureties submitted themselves to the jurisdiction of the court in such way that the court might determine all the questions raised, and if, after doing this, appellee had, by *proper pleading sought to recover on the bond, and upon hearing, after notice, the court had rendered a decree against the sureties for the deficiency*, the principle would apply. If in the case instanced, they had submitted to hearing without demanding a trial by jury, they would be deemed to have waived it. The action being, as the Court of Appeals decided, an action on the bond,—a common law action,—the case would, on motion, be transferred to the law docket and a trial by jury had

(Equity Rule 22). However, *there was no pleading filed asserting the liability of the sureties.*

Moreover, the decision reduces itself to the proposition that the *grounds* relied upon in the motion are the controlling elements. The court states some of the points raised,—non-liability on the bond, *res adjudicata* and satisfaction of the foreclosure decree. These, the court say, "invited" the trial court "to pass on the merits of the question" with the result that the court determined the merits. The corolary of this is that if petitioner had raised no question on the "merits," but confined himself to the constitutional questions, the result would have been different. So that the nature of the grounds asserted controls, rather than an appearance. Yet the constitutional questions are here raised by direct appeal.

As before stated, the decree on the motion, simply *overruled* it. It did not *fix*, nor did it attempt to *fix, the liability of the sureties on the bond*, but merely affirmed that which had previously been done. It adjudged the regularity and validity of the prior proceeding, and nothing more. Without proper pleading, this was all the court could do. It was all it was called upon to do. The sureties did not seek a decree on the bond against themselves, nor did appellee do so. There was no decree against the sureties on the bond *after* they submitted themselves to the jurisdiction; and this is essential to a correct application of the rule invoked, as shown by Windsor vs. McVeigh, 93 U. S., *supra*. The court was called upon to determine the validity of the decree on the mandate. It determined that it was valid, and that is the question here presented. Was the decree on the mandate valid?

In this connection it is important to remember that the execution under which petitioner was required to pay, issued under the *decree on the mandate, and prior to the decree on the motion.* (Trans. 2781, pp. 75-76). The decree over-

ruling the motion did not authorize an execution. The execution, therefore, was void because issued pursuant to a void decree. (Trans., p. 57).

The effect of the decision is that notwithstanding the decree on the mandate was absolutely void, the decree overruling the motion validated, vitalized and gave effect to it.

In Wetmore vs. Karrick, *Supra*, the invalidity of the judgment resulted from the fact that a previous order of dismissay, discharged the defendant from court. Its jurisdiction was therefore lost.

In Reynolds vs. Stockton, *Supra*, the receiver was properly served with process, appeared and answered. A final judgment was rendered, with reservation of certain questions. Subsequent proceedings were had, and a *new and different cause of action asserted* against the receiver. Notice of this was served on his attorney of record. Judgment was rendered against him. It was held, in a collateral proceeding, that this judgment was void.

In Hovey vs. Elliott, *Supra*, after appearance by the defendants, they were adjudged in contempt of court and their pleadings stricken out as punishment. The subsequent judgment against them was held void.

In the cases of Windsor vs. McVeigh, *Supra*, the defendant's pleadings were stricken out because he was an "alien enemy." The subsequent judgment against him was held void.

Scott vs. Ellery, *supra*, was a bill to vacate a decree for a dificiency in a foreclosure case. This decree was rendered against the defendant without notice. The court in the foreclosure decree had retained control of the case for further orders. The contention of Scott was that by this reservation, Ellery was continued in court and the court had jurisdiction to proceed without further notice. This court held otherwise, and that the judgment was void. It will be observed that the bill raised the question of jurisdiction (as it

was by the motion in this case), and Ellery pleaded (and it raised an issue on the "merits") his discharge in bankruptcy. No one supposed that by filing the bill to vacate the decree, Ellery waived anything. On the merits there was no doubt of his liability for the deficiency, but the question of liability did not affect the question of jurisdiction. And that is exactly this case. Had the decree in that case been against Ellery, there is no doubt but that it would have been reversed by this court. The court could not, and would not, inquire into the question of liability, and finding that he was liable, affirm the judgment notwithstanding it was rendered without notice and by the court at a time when it had no jurisdiction to do so. No one would suppose that the filing of the bill was a waiver of the objection to jurisdiction. The difference between that case and the case on appeal from the decree overruling the motion, is one of form only.

It could not be held that if in the proceedings had in the Wetmore case, the defendant had sought by motion to vacate the void decree, and there had been an order simply overruling it, and an appeal from that order, such order would have validated to previous judgment on the verdict. If, however, the plaintiff, after defendant appeared, had sought a judgment on the verdict and the court had awarded it, that judgment would have been valid, but the original judgment would still be void.

If the principle applies in this case, it applies equally to all others, and therein lies consequences of such gravity and considerations of such importance, as to at once challenge the serious attention of this court.

Suppose one files a bill to recover a pecuniary decree and to foreclose a mortgage. There is no service of process and no appearance by the defendant. A decree is entered in favor of the complainant. The defendant appeals, but before doing so he files a motion for a rehearing to have the

decree set aside in which he sets up that the decree was entered without notice and that he has a valid defense,—for instance,—a former decree in his favor. We may say he admits the execution of the obligation to pay and the mortgage. It appears on the hearing of the motion that no process was served and no appearance entered prior to the decree, *but he has no defense in fact.* The court, however, enters no *new decree,* but simply overrules the motion. What is the status of the defendant here, and what is the question to be decided? Is it not whether, in the first proceeding the defendant had enjoyed the privileges vouchsafed him by the constitution, rather than his waiver of those rights and his liability to judgment? What, we may inquire, is the difference, in legal effect, of an appearance by motion to set the decree aside and an appearance by bill to enjoin? They are both addressed to the same court, allege the same facts, ask substantially the same relief, and are, in fact, *in the same case.*

To continue the illustration: If the trial court had granted the motion for a rehearing, and after hearing, on proper pleading had entered another decree against the defendant and he appealed he would have had his day in court, and there being no other question determinable in his favor the decree would be affirmed,—not because he waived, but because he had enjoyed his constitutional rights.

Suppose a judgment is rendered in the trial court adjudging one guilty of a felony and sentencing him to a term at penal servitude. He files a motion at the same or at a subsequent term to set aside the judgment, alleging that his conviction was not based on an indictment returned by the grand jury; that he had no notice of the proceeding, that he had, on a previous trial, been acquitted of the same charge, and that he was "not guilty" as charged. It appears at the hearing on the motion that no indictment had been returned and no trial had or hearing given, but the court

nevertheless denies the motion on the theory that the defendant was guilty. The defendant then sues out a writ of error from the judgment of conviction. What is his status here, and what question is before the court for consideration, It is whether by filing the motion he waived his constitutional rights? It is whether his conviction, in the first instance, was legal. Would the judgment denying the motion give validity to the prior proceeding? Certainly not. Suppose the time for an appeal had expired and he sued out a writ of habeas corpus, and the writ being denied him, he appealed. Has he waived his rights by not appealing and by instituting the habeas corpus proceeding?

The effect of the decision here is to give effect to a void judgment, because of an unsuccessful effort in the trial court, the only court to which resort in any event could have been had, to vacate it. A judgment without pleading to support it, without notice to the petitioner, is vitalized and given effect because he sought relief against it. Not even the legislative power could have given it effect, yet it is that the judicial power has done so. As we have said, if appellee had, after the filing of the motion, sought, by appropriate pleading, to recover on the bond and petitioner had not demanded a trial by jury, he would be deemed to have waived it. He was in court *after* that for all purposes and the court had jurisdiction. But appellee did no such thing.

With the utmost respect for the opinion of the court, it is no sufficient answer to say that the sureties on the bond are liable. *"The liability and the right are inseparable."* (Windsor v. McVeigh, *supra*). The question is whether that liability has been established in a manner consistent with the constitution.

McVeigh v. United States, *supra*, Galpin v. Page, *supra*, and Windsor v. McVeigh, *supra*, were decided upon great consideration at times and under circumstances which commanded the patient, earnest and thoughtful examination of

the subject; and there was then erected those substantial pillars, founded upon the rights of free men and expressed in the constitution, upon which all subsequent decisions on the subject rest. It is now for this court to decide if those enduring monuments shall continue to exist. It may be that petitioner is liable on the bond. It may be that if a mode of procedure consistent with the constitution had been followed he would have no ground of complaint. But to say that because he is thus liable, and for that reason, not entitled to appear and defend, is to strike the first blow to destroy the constitution. The answer to the whole case is in this:

> "It is urged when the necessary facts appear in the record such correction can be made without notice, because, it is said, there is nothing to litigate. But aside from the fact that this proposition ignores the rule that jurisdiction once lost can only be regained by some proper notice, the case at bar is an illustration that such action *may* impair the substantial rights of a party to be heard against the rendition of a new judgment against him." (Wetmore v. Karrick, *supra*).

We close with the following from Hovey v. Elliott:

> "Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the Government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the Government sitting to uphold and enforce the Constitution is the only one possessing a power to

> disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs they were created to prevent."

LIABILITY ON THE BOND.

Whether the Court of Appeals was right in its decision of this question, depends upon whether this case is distinguishable from Kountze v. Omaha Hotel Co., 107 U. S., 378.

That case decided that "an appeal bond in an ordinary foreclosure suit * * * does not operate as security for the amount of the original decree; nor for the interest accruing thereon pending the appeal; nor for the balance due after applying the proceeds of the mortgaged premises, etc."

Petitioner says this was "an ordinary foreclosure suit," and that case determines the question here. The bill, set out in the record, is in every sense a bill to foreclose a mortgage,—"an ordinary foreclosure suit." But the Court of Appeals, not controverting this, decided that the question of liability depended upon the *terms of the decree*, rather than the character of the suit.

That court said (referring to the Kountze case):

> "It was distinctly pointed out in the opinion rendered in that case that the decree appealed from was not a personal one for the debt which the mortgage secured and that the personal liability of the debtor could have been enforced while the decree from the foreclosure decree was pending."

The decision is predicated upon the idea that there was, in this case, a personal decree enforceable by execution, and because execution was stayed, the sureties are liable, notwithstanding it was "an ordinary foreclosure suit." The necessary implication is that this court, in the Kountze case, decided that a defendant might appeal from that part of

the decree which awarded foreclosure, and leave the personal liability to be enforced by execution. This court did not intimate that such a course could be pursued. The language of this court referred to is set out later.

The decision on this point is at war with the notions we have derived from the English law, as announced, expounded and enforced by this court, with respect to the nature and power of the Federal courts of equity in foreclosure cases.

A review of the origin, nature and extent of the power of the court of chancery would be interesting, but entirely out of place. We need go little further than the Kountze case to demonstrate the error in the decision here.

In Noonan v. Bradley, 67 U. S., and Orchard v. Hughes, 1 Wall., 77, it was decided,and it has been the unquestioned law in this court for more than fifty years,—that in the absence of a rule, the Federal courts of equity did not have the *power* to render a decree for a deficiency in a foreclosure case. The decision went to the power of the court, not to the manner of its exercise. The court had jurisdiction of the case, but it had not the power to render the particular decree,—a decree "against the person." So that, as pointed out in the Kountze case, the plaintiff was required to prosecute a second action in a court of law. This is the starting point. To obviate the necessity of a second action, Rule 92 (now Rule 10) was adopted. It provides that in suits for the foreclosure of mortgages, a decree may be rendered for the *balance that may be found due.* This calls for the assertion of the judicial power,—a power conferred by the rule, without which the court could not proceed,—a *power to render a personal decree for the payment of money.* The rule itself fixes the time and conditions under which it may be exercised. The power to render a decree for the "balance" of the debt, necessarily implies that the time for its exercise is after the sale of the mortgaged property.

There is no authority for the exercise of the power beforehand. This was the course pursued in the Kountze case. If the decree of foreclosure here had gone beyond that, and provided for the deficiency, it would have been, to that extent, a mere nullity. (7 Encl. U. S. Reports, pp. 621-622) which shows that there was no personal decree here, enforceable by execution, and could be none until after the mortgaged property was sold.

The court in the Kountze case took particular pains to say that the rule referred to "has not changed the essential nature of the decree of foreclosure and sale." It simply conferred a power, prescribed a time for its exercise and a method for its enforcement. All which, logically, leads to the conclusion, that in a foreclosure case there can be no decree "against the person" enforceable by execution, until after the sale of the foreclosed property. The rule being the source of the power of the court, the power must be exercised in conformity with it.

That part of the decision of Kountze v. Hotel Company, to which the court refers is, that in a foreclosure case, the supersedeas does not suspend execution for the debt. Why? Because the plaintiff has no right to such an execution by the decree of foreclosure and sale. It is not a decree against the person, and cannot be enforced by an execution against goods and lands generally. And why? Because the court had not the power, at the time of its rendition, to authorize such an execution.

> "The rule of court by which a personal decree may, in some cases, be entered up against the mortgagor for the *residue* of the *debt*, after the proceeds arising from the sale of the land have been applied, is a recent rule, intended to obviate the necessity of a separate action. It has not changed the essential nature of the decree of foreclosure and sale." (107 U. S., 378).

The Court of Appeals misread the portion of the Kountze case referred to at page 63 of the Record. The statement is:

> "It was distinctly pointed out in the opinion rendered in that case (page 393) that the *decree appealed from* was not a personal one for the debt which the mortgage secured, and that the personal liability of the debtor could have been enforced while the appeal from the foreclosure decree was pending."

The portion of the Kountze case mentioned was a discussion of the nature of foreclosure decrees generally, and is not a reference to the *decree appealed from.*

The reference to the enforcement of the personal liability pending the appeal means nothing more than that pending the appeal the plaintiff might prosecute a separate action at law for the recovery of the debt. The language is:

> "The debt may be prosecuted by a personal action against the debtor, and this may be the defendants in the suit or some other person."

The court did not decide, nor has it in any other case decided, that where a decree of foreclosure is entered against a sole defendant, he may appeal and supersede so much of the decree as awards foreclosure and leave that part for the recovery of the debt unappealed from and subject to be enforced by execution.

There is no such thing in legal contemplation as a divisable decree of foreclosure. A defendant may not appeal from that part which awards foreclosure and leave that part for the payment of money to be enforced by execution. Such a proceeding would be an idle ceremony, for notwithstanding the appeal and supersedeas, an execution could issue, and, unless other proceedings were had in the trial or appellate court, even the foreclosed property might be levied upon and sold. The object sought by the supersedeas is to stay all proceedings pending the appeal, not to incite and encourage further litigation.

We think this case comes clearly within the rule of the Kountze case. The decision here is furthermore in conflict with Louisville, Etc., Ry. v. Pope, 74 Fed., 1, and Dexter, Horton & Co. v. Sayward, 79 Fed., 237.

The decision in Omaha Hotel Co. v. Wade, 97 U. S., 13, on the appeal of which the bond involved in the Kountze case was given, was decided in 1878, and Mr. Justice Miller states that at that time three years had elapsed since the decree of foreclosure was entered, so that, the decree in that case was nearly fifteen years after the adoption of Rule 92. The existence of the rule, therefore, did not affect the question of the liability of the sureties on the bond.

The conclusion is that there was not, and could not be, a personal decree, *enforceable by execution*, in the decree of foreclosure, and the decision being based on the idea of such a decree.

In the Kountze case this court construed the word "damages" as used in the statute prescribing the conditions of a supersedeas bond in this character of case. In determining the meaning of this word, reference was made to the earlier Acts of Congress, to the common law on the subject of writs of error, various Acts of Parliament, the Acts of the Legislature of the several States, and the previous decisions of this court. All the learning on the subject is there fully discussed. The conclusion was reached, after great deliberation, that a bond in such a case did not operate as *security*.

The decision in this case overturns and renders of no effect the decision there. Instead of the liability of the sureties being made to depend upon the character of the suit, as this court decided, it is now made to depend upon the *terms of the decree* appealed from. The commonly used phraseology of a judgment at law is that "plaintiff so have and recover of the defendant" the amount due. The language generally used in a decree of foreclosure is that "the defendant is indebted to the complainant" in a certain sum

and *directs its payment* within a stated time. In the latter case the bond does not operate as security. But if, in a foreclosure suit the decree is that "plaintiff do have and recover of the defendant," and directs a sale in default of payment, the bond does operate as *security*, according to the decision here. All that is necessary to make the bond operate as security is to change the form of expression. The practitioner will have no difficulty in framing his decree accordingly, and thereby accomplish that which this court has decided was not intended by the statute and the rule of the court. It effectually takes away the rights of appeal and supersedeas in the most important class of cases. If there be a decree in a foreclosure suit against a railroad company in which the complainant *"do have and recover"* of the defendant a million or ten million dollars, the defendant may not appeal and supersede the decree and thereby retain possession of its property, to which it is entitled as a matter of right, without giving a bond to *secure* the payment of the *whole amount of the decree.* It may be a second or third mortgage. The company could not retain possession of the property for the protection of the first mortgagee without paying, or securing beyond doubt, the payment of the decree. The statute and the rule and decision of this court cannot be avoided by this convenient adoption of a form of expression.

The Kountze case has been the light to guide the courts for nearly forty years, and that it has served its purpose well is shown by the fact that the question there decided has not since been mooted in this court or in any of the inferior Federal courts, thought it was cited in Crane v. Buckley, 203 U. S., 443, on the point here controverted.

The idea permeating the opinion of the Circuit Court of Appeals is that the purpose of the statute and rule was to *secure so much of the amount awarded by the decree of foreclosure as was not "OTHERWISE SECURED."* The cases

cited arose on appeals from judgments and decrees for the payment of money *"not otherwise secured."*

The adjudged cases on the subject are divided into two classes:

(1) Where the decree or judgment appealed from is for the recovery of money *"not otherwise secured,"* the bond operates as security for the payment of the amount of the judgment or decree. (Catlett v. Brodie, 9 Wheat., 553, and others cited in the opinion here).

(2) Where the suit is one in which the property necessarily follows the event of the suit, as in real actions and replevin and in *suits on mortgages*, or where the decree or judgment is *"otherwise secured,"* the bond operates only as indemnity for loss by reason of the appeal. It does not operate as security for the debt, interest accruing pending appeal, or, in a foreclosure case, for any deficiency remaining after the application of the proceeds of the mortgaged property. (Kountze v. Omaha Hotel Co., *supra;* Louisville Etc. Ry. Co. v. Pope, 74 Fed., 1; Dexter Horton & Co. v. Sayward, 79 Fed., 237; The Sydney, 47 Fed., 261).

The rule announced here is an entirely new one; viz: That in a foreclosure suit the bond operates to secure so much of the foreclosure decree as is not secured by the mortgage. The result is exactly the contrary to the decision in the Kountze case, for it only expresses in a different way the idea that the bond operates to secure the *deficiency*, when the decree is that plaintiff *"do have and recover."*

It is respectfully submitted that the writ of certiorari should be granted as prayed for.

PERRY J. LEWIS,
Counsel for Petitioner.

FRANK H. BOOTH,
of Counsel.

I, Frank H. Booth, of counsel for petitioner named in the foregoing petition, solemnly swear that I have read the said petition and that the facts therein set out are true to the best of my knowledge, information and belief.

FRANK H. BOOTH,

Subscribed and sworn to before me, this the.....day of January, A. D. 1916.

.....

Notary Public, Bexar County, Texas.

I, Perry J. Lewis, attorney and counselor at law, admitted to practice in the Supreme Court of the United States, hereby certify that I have examined the foregoing petition for writ of certiorari. That the same is not made for the purpose of delay and that in my opinion said petition is meritorious and well founded in law and ought to be granted and the writ issued.

PERRY J. LEWIS,
Counsel for Petitioner.

THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1915.

CLARK PEASE, Petitioner,

versus

RATHBUN-JONES ENGINEERING COMPANY, Respondent.

Comes now Clark Pease, by Perry J. Lewis, Esq., of counsel, and moves this Honorable Court that it shall by certiorari, or other proper process to the Honorable, the Judges of the Circuit Court of Appeals for the Fifth Circuit, require the said court to certify to this Honorable Court for its review and determination a certain cause in said Circuit Court of Appeals lately pending, wherein your petitioner was appellant and Rathbun-Jones Engineering Company, was appellee, numbered No. 2804, and to that end he now tenders herewith his petition and brief with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

PERRY J. LEWIS,
Counsel for Petitioner.

FRANK H. BOOTH,
of Counsel.

No. 2804.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE FIFTH CIRCUIT.

CLARK PEASE, Appellant,

versus

RATHBUN-JONES ENGINEERING COMPANY, Appellee.

The appellee is hereby notified that appellant will on Monday, the 7th day of February, A. D. 1916, upon his verified petition and a copy of the entire record in this cause, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which and of the petition for writ of certiorari and brief in support thereof are herewith delivered to you, to the Supreme Court of the United States, in its court room at the capitol, in the City of Washington, D. C.

PERRY J. LEWIS,
Counsel for (Petitioner) Appellant.

The foregoing notice is hereby accepted and delivery of a copy thereof and of the petition and motion for certiorari and brief in support thereof, are hereby acknowledged.

TERRELL, WALTHALL & TERRELL,
Counsel for Appellee.

January ....., 1916.

DEC 4 191
JAMES D. MAHER
CLERK

(25,103)

No. [redacted] 360

OCTOBER TERM, 1915

IN THE

Supreme Court of the United States.

CLARK PEASE, APPELLANT,

vs.

RATHBUN-JONES ENGINEERING COMPANY,

APPELLEE.

On Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit to Review a Decree of that Court, Affirming a Decree of the District Court of the United States for the Southern District of Texas.

Supplemental Brief for Appellant.

PERRY J. LEWIS,
Counsel for Appellant.

FRANK H. BOOTH,
Of Counsel.

(25,103)

No. 820.

OCTOBER TERM, 1915

IN THE

Supreme Court of the United States

CLARK PEASE, APPELLANT,

vs.

RATHBUN-JONES ENGINEERING COMPANY, APPELLEE.

On Writ of Certiorari to the Circuit Court of Appeals for the Fifth Cricuit to Review a Decree of that Court, Affirming a Decree of the District Court of the United States for the Southern District of Texas.

Supplemental Brief for Appellant.

To the Court:

In the briefs filed by Appellee in this case and in No. 419, October Term, 1916, statements are made which are not a correct reflection of the record and calculated to mislead. As far as the case of Appellant is concerned, it has

been briefed with the utmost fidelity to the record, and but for the erroneous and misleading statements of Appellee, nothing further would be said. We desire, however, to call attention to the following:

1. Recognizing that the record in No. 419, may properly be considered in disposing of this case, by having cited it in the brief, Appellee nevertheless says that our reference to the contents of the answer of the defendant in the foreclosure suit "is not sustained by any record in this case nor would it be sustained if the record were before the court." (Brief, p. 2). The statement of Appellant was that "the defendant answered, setting up defenses not material, except to the extent that it denied and controverted the right of the plaintiff to have any relief against it either by way of pecuniary decree, foreclosure of lien or execution." (Brief, p. 2). This is almost a literal copy of the proof offered in No. 419 (page 72, paragraph next to the bottom), a statement of the proof agreed to by counsel for Appellee. (Tr. 419, p. 76). Appellant's statement is, therefore, sustained by the record.

2. It is said that there was no proof that notice was not given. (Brief, p. 10). It is not claimed that notice was given. The same is said at page 11 with reference to the pleading. It is not said, however, that there was a pleading on which the decree was based. The clerk certified that the record is *complete*. (Tr., p. 56). No notice or pleading there appear. Notice and pleading are necessary to confer jurisdiction, and the absence of either is fatal. The error is fundamental. It does not have to affirmatively appear. The proceedings of a subordinate court may be reviewed here and the judgment reversed where the error is apparant in the record, although not shown by a bill of exceptions, and do not appear in an agreed statement of facts, or by demurrer or in a special verdict,—"as where the original process was unauthorized or where the defendant was not

served with process, or where the proceedings under the process were irregular and void. (The N. O. O. & G. W. Ry. Co. vs. Morgan, 10 Wall., 256).

Furthermore, this is an appeal from the decree on the mandate, and no opportunity was given Appellant to *prove* anything. It is, to say the least, a strange proposition that Appellee can go to the trial court and obtain a decree without notice and pleading, and then sustain it in this court by saying that Appellant did not *prove* want of notice and pleading.

3. It is said (Brief, p. 11) that "more than $200.00 of said judgment was not secured by the *mortgage*." This is misleading. The decree was for $6,804.90. The property was ordered sold to satisfy the whole decree. (Tr., p. 23). A part of the debt may not have been secured by the mortgage, but Appellee sought and obtained a foreclosure of the lien to secure the *whole recovery*. (Tr., p. 9, Brief, pp. 2, 4).

4. Another statement calculated to mislead, is the citation of a Rule of the District Court. (Brief, p. 23). We do not know whether this is a rule of the District Court of the Southern District or not. We do know it was entered in the minutes of the Eastern District. The purpose of citing the rule is to lead to the belief that it applies to proceeding in equity causes. On its face, however, it applies to proceedings at law only. It was made in conformity with the provisions of Section 914, relating to "Practice and procedure in other than equity and admiralty causes," Section 915, relating to "Attachments," and Section 916, relating to "Execution in common-law causes."

Richards vs. Harrison, 218 Fed., 134, is cited to sustain the point that an execution could issue under the foreclosure decree, without an order of the court. The headnote of the case is copied. The case does not decide what is said in the headnote. The decision was: "The general rules in

equity provide that when a judgment is for the *payment of money* only it shall be enforced by writ of execution." Therefore, the judgment being for the payment of money only, execution might issue under Rule 8 without an express order. It may be, and probably is true, that the terms of Rule 8 are such that where the decree is for the payment of money only, the court need not order the issuance of execution; in other words, the rule is self-executing. It is a part of the law. That is what the court in the above case decided,—in principle. But Rule 8 does not apply to decrees in foreclosure cases, until the court, in the exercise of the authority conferred by Rule 10, has rendered a deficiency decree; and this cannot, in the very nature of things, be done until after the sale of the property incumbered by the lien. It is to ignore the plainest dictates of reason to say, (1) that a court of equity has no *power* to render a decree for a deficiency and enforce it by execution (Noonan vs. Bradley, 2 Black, 499; Orchard vs. Hughes, 1 Wall., 77); (2) that Rule 10 was adopted to confer such power (Kountze vs. Hotel Co., 107 U. S., 378), and at the same time say, as counsel do, that without the court proceeding under Rule 10,—an order of the court pursuant to the power given—an execution may issue to collect the deficiency.

5. It is not necessary for us to contend with counsel over the question of whether the trial court may, after the adjournment of the term, "make the record speak the truth." The record does not disclose, or intimate, that the trial court attempted to make the record "speak the truth." The fact is, the record shows the court made and entered an entirely new decree in the cause. It may be inquired, moreover, whether the court may, under *any* circumstances, amend or "correct" a decree or "make it speak the truth," in such a way and at such a time as to fix a liability upon sureties who have previously signed a supersedeas bond, where otherwise such a liability would not exist.

6. The decision of the Court of Civil Appeals of Texas in Aldridge vs. Pardee, 60 S. W., 791, that a sale under execution after the dissolution of a corporation is void is correct. Its the law under the present Statute cited at page 31 of Appellee's brief. There is no provision in the Texas Statute similar to that in the New Jersey Statutes cited by Appellee.

It has never been contended in this case, as counsel very well know, that the death of one defendant abated the suit as to the survivor, nor that because of the death of one defendant after judgment, an execution could not issue against the survivor. It is contended that the People's Light Company was the *sole* defendant in the cause,—the sole defendant against whom a decree was rendered,—and that upon its dissolution the suit against it abated and that no proceedings whatever could lawfully be taken,—whether by the issuance of execution or otherwise, until the suit was revived.

7. The counsel say several times in the course of the brief that "Clark Pease, as trustee for himself and the other stockholders of the Peoples Light Company, * * * paid the judgment in full." They cite a certificate of the clerk, at page 89 of the Record in No. 419. They fail to cite the marshal's return on page 90, nor the letter of the marshal to counsel for Appellant on the same page.

As a proper predicate for the statement following, counsel call attention to the fact that the certificate of the clerk, and marshal's letter and return mentioned, were filed in the Circuit Court of Appeals after the filing of the transcript. This, we think, justifies the statement that an issue was made in *that* court as to whether this payment was made by Mr. Pease or by Mr. Pease "as trustee for himself and the other stockholders, etc." Attention is also called to the fact that the articles of dissolution of the corporation (Tr., p. 42) show that at the time of dissolution Mr.

Pease was neither an officer or stockholder, and, hence, could not have been one of the trustees of the dissolved corporation. The president and directors are the trustees under the Statute of Texas, cited at page 31 of Appellee's brief. The certificate of the clerk and the return of the marshal are irreconcilable; the fact that Appellant was not one of the trustees is inconsistent with the former; the Court of Appeals, in deciding the issue said that "Clark Pease, under protest, paid the amount called for by the execution against him." (Tr., p. 60). The Court of Appeals further decided that because he,—Clark Pease,—paid the judgment pending appeal, his appeal, in the suit to enjoin the sale of his property, should be dismissed, and this was done accordingly. Yet counsel say and attempt to influence the judgment here by saying, that Mr. Pease did not pay the judgment, as the Court of Appeals decided.

Aside from the fact that the question was decided contrary to Appellee's statement, a very interesting sidelight is here thrown on the morals and merits of the case from Appellee's standpoint. The statement is that a judgment, illegal in its inception, has been used to take from Appellant, "trustee for himself and the other *stockholders*," property which to them belonged as of right, without even the semblance of a hearing,—a proceeding not even "clothed in the form of a judicial sentence." The certificate of the clerk is peculiar. It does not say that the money was paid by Appellant as trustee of the dissolved corporation. This would have been at variance with the certificate of dissolution. It says that the payment was by Appellant "as trustee for himself and the other stockholders." Quite a significate variance. None of the stockholders are parties to this suit and never have been; yet, according to the statement here, the property of the stockholders has been taken. Can such a proceeding receive the sanction of this court? If so, "then the judicial department of the government, sitting to

uphold and enforce the constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and enforce justice, courts possess the right to inflict the very wrongs they are created to prevent." Mr. Justice White, in Hovey vs. Elliott, 167 U. S., 417-18.

8. The reply of Appellee to the first specification of error (Brief, p. 6) entirely overlooks the point that even though sureties on bonds become parties to the suit by signing, judgment can never be rendered against them *without notice* and hearing, unless the Statute or Rule of court under which the bond is executed provides otherwise. The Statutes of Texas are not applicable to this case. But even if they were, there is nothing in them to sustain this proceeding, for it has been decided that if the Appellate Court fails to render judgment on the bond, as authorized by the Statute, the trial court has no authority to do so, but resort must be had to a suit on the bond. (Burck vs. Burroughs, 64 Tex., 445; Blair vs. Sanborn, 82 Tex., 686).

There is not a reported case in which it has been held that in the absence of a statute or rule authorizing it, the court may enter judgment on the bond without notice. Such a proposition would be fundamentally vicious.

Respectfully submitted,

PERRY J. LEWIS,

FRANK H. BOOTH,

Counsel for Appellant.

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(25,103)

No. 820

OCTOBER TERM, 1915.

IN THE

Supreme Court of the United States.

CLARK PEASE, APPELLANT,

vs.

RATHBUN-JONES ENGINEERING COMPANY,
APPELLEE.

On Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit to Review a Decree of that Court, Affirming a Decree of the District Court of the United States for the Southern District of Texas.

Brief for Appellant.

STATEMENT OF THE CASE.

The present controversy grows out of proceedings in the United States District Court for the Southern District of Texas, upon the return of the mandate of the Circuit Court of Appeals for the Fifth Circuit, sent down after affirmance of the case of Peoples Light Company, Appellant, vs. Rath-

bun-Jones Engineering Company, Appellee, and in the proceedings in the Circuit Court of Appeals for the Fifth Circuit on an appeal to that court from the proceedings aforesaid in the District Court.

The following is a brief history of the proceedings:

The suit was instituted by the Rathbun-Jones Engineering Company against the Peoples Light Company, the plaintiff alleging in substance, that on or about the 9th day of August, 1909, it made and entered into a contract with the defendant whereby it contracted to sell and deliver to the defendant certain machinery, particularly described, for the sum of $14,000.00; that the machinery was delivered as contracted and that there remained unpaid on the purchase price, $5,360.35, and claimed a further indebtedness of $216.79. The plaintiff alleged that the contract had been duly filed in the office of the County Clerk of Nueces County, Texas, and constituted a valid and subsisting mortgage lien on the property described, to secure the amounts due plaintiff. The plaintiff prayed a pecuniary decree against the defendant for the amounts stated, and that the same be declared a lien upon all the aforesaid property; that the lien be foreclosed and the property sold for the payment of the debt, interest and costs, and if thereby a sufficient amount was not realized for the purpose of satisfying the decree in full, that it have a writ of *fieri facias* for the balance, to be levied upon the goods and chattels, lands and tenements of the defendant. The bill appears in the record at pages 4-22.

The defendant answered setting up defenses not here material, except to the extent that it denied and controverted the right of the plaintiff to have any relief against it, either by way of pecuniary decree, foreclosure of lien or execution.

The trial of the case on January 9, 1914, resulted in a decree in favor of the plaintiff.

> "That plaintiff do have and recover of and from the defendant, the sum of five thousand, five hundred sixty-seven dollars and fourteen ($5.567.14) cents, together with interest thereon at the rate of 6 per cent per annum from and after March 1, 1910, amounting to the sum of one thousand, two hundred thirty-seven and seventy-six ($1,237.76) cents, aggregating the sum of six thousand, eight hundred and four and ninety ($6,804.90) cents."

It was further ordered that the lien of plaintiff be established and foreclosed, and if the amount was not paid within sixty days, and order of sale should issue directed to the marshal of the district commanding him to sell the property therein described to satisfy the debt. (Trans., pp. 23-24).

There was an appeal by the defendant, and the execution of a supersedeas bond with Clark Pease (appellant) and Gust Heye, Jr., as sureties, and conditioned as follows:

> "Now, therefore, the condition of the above obligation is such that if the said Peoples Light Company shall prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void, otherwise to remain in full force and virtue." (Trans., pp. 26-28).

The decree of the District Court was affirmed (Peoples Light Co. vs. Rathbun-Jones Eng. Co., 218 Fed., 167), and the mandate returned to and filed in the District Court, January 20, 1915. The mandate ordered execution against the sureties and on the bond for costs incurred on appeal. (Trans., p. 28).

February 24, 1915, the District Judge entered a decree on the mandate in which it was ordered that the mortgaged property be sold and that

> "In the event said property does not sell for sufficient to satisfy said judgment, interest and costs, the clerk of this court issue execution against the

defendant *and against the sureties on the appeal bond herein,* Clark Pease and Gust Heye *for any deficiency that may remain."* (Trans., pp. 31-32).

This decree (which will be referred to as the decree "on mandate") was rendered without pleading, and without notice to the defendant or sureties on the appeal bond and without giving either of them an opportunity to appear and defend against the rendition of any judgment against them for the deficiency, or on the bond.

In the meantime (January 27, 1915) the Peoples Light Company, which was a corporation, had been dissolved in the manner provided by the laws of the State of Texas, (Trans., p. 42), and Gust Heye, Jr., one of the sureties, had died, April 2, 1914, and Elenita S. Heye had been appointed administratrix of his estate by the County Court of Nueces County, Texas. (Trans., p. 38).

From the decree on the mandate, appellant prosecuted an appeal to the United States Circuit Court of Appeals for the Fifth Circuit (Trans., p. 44) where the decree of the District Court was affirmed, December 7, 1916. (Trans., p. 63; 228 Fed., 273).

The record in No. 419, October Term, 1916, shows that subsequent to the decree on the mandate, appellant filed a motion in the trial court, to vacate the decree appealed from. (Trans. No. 419, pp. 33-43). This was denied. (Trans. No. 419, p. 76).

OPINION OF THE CIRCUIT COURT OF APPEALS.

1. The substance of the opinion of the Circuit Court of Appeals is that assuming that the sureties on the supersedeas bond had the right to have the question of their liability thereunder adjudicated in an action at law on the bond, with the concurrent right of trial by jury, this right could be waived, by submitting the question to the court which rendered the decree appealed from. The court could

at the request or with the consent of the sureties, determine their liability. It is said that several grounds were stated in the motion to vacate the decree on the mandate which directly invoked a ruling on the question of liability of the sureties. The court was called upon by appellant to adjudicate the question. This, it is decided, constituted a waiver of the objections to the jurisdiction of the court, "though the submission of the controversy to that court for its decision is accompanied by the suggestion that that court had not acquired jurisdiction of the person so appearing in it."

2-3. That a supersedeas bond given on appeal from a decree of foreclosure operates as security for the payment of "so much of the decree for the payment of money as was left unsatisfied after the application to the decree of the amount realized on the sale of property subjected to a lien and ordered to be sold."

4-5. The jurisdiction of the court was not exhausted by the rendition of the foreclosure decree, but continued until the decree was satisfied. The part of the decree unsatisfied after the sale, was "solely for the payment of money," and the appropriate final process was an execution, the enforcement of which the motion sought to forbid.

The case is here on writ of certiorari granted February 28, 1916. (Trans., pp. 100-101).

The case is submitted on the following specifications of errors in the decree appealed from:

FIRST SPECIFICATION.

The decree appealed from was erroneous in so far as it directed the issuance of execution against appellant for any deficiency which might exist after the sale of the mortgaged property, for that said decree was entered without pleading, without notice, and without hearing against, to or of appellant; and the enforcement of said decree, therefore, was in violation of the Constitution of the United States, in that it deprived appellant of his property with-

out due process of law. (Second Assignment of Error, Record p. 50).

FIRST POINT.

A judgment or decree of a court against one not a party to the proceeding, without pleading against him, without service of process or notice and an opportunity to be heard, is not due process of law, and void for want of jurisdiction.

AUTHORITIES.

Galpin vs. Page, 18 Wall., 350.
Hovey vs. Elliott, 167 U. S., 284.
Reynolds vs. Stockton, 140 U. S., 254.
Wetmore vs. Karrick, 205 U. S., 141.
Windsor vs. McVeigh, 93 U. S., 274.
Windsor vs. United States, 11 Wall., 259.

SECOND POINT.

Conceding that by signing an appeal bond one makes himself so far a party to the litigation as to subject himself to the jurisdiction of the court, yet he does not thereby surrender his right to be heard, and if judgment be taken against him without pleading, notice or an opportunity to be heard, it is void.

AUTHORITIES.

Blair vs. Sanborn, 82 Texas, 686.
Booth vs. Bedford, 57 Mich., 357.
Burck vs. Burroughs, 64 Texas, 445.
Ex Parte Mills, 1 Yerg., 435.
Halsey vs. Murray, 112 Ala., 185.
Miller vs. Fralich, 31 Mich., 431.
Miller vs. Hogeboom, 56 Neb., 434.
Offerman vs. Waycross, 112 Ga., 610.
Stephens vs. Miller, 3 Ky. Law, 523.
Waysman vs. Updengraff, 1 Kan., 516.

SECOND SPECIFICATION.

The decree appealed from was erroneous in so far as it directed the issuance of an execution against appellant for that if any liability rested upon him by reason of the bond on appeal, the same can be enforced only in an action at law on the bond, at the trial of which the issues may be inquired into by a jury; and the entry of said decree was contrary to the Constitution of the United States in that it deprived appellant of the right of trial by jury in an action at common law. (Third Assignment of Error, Record p. 50).

First Point.

Whether the trial court may enter judgment on an appeal bond against sureties, without a trial at law at which a jury may be called, depends upon the provisions of the statute or a rule of court authorized by legislative enactment.

Authorities.

Harriat vs. Ballon, 9 Pet., 156.

Second Point.

The cause of action on an appeal bond, from a decree of foreclosure, against sureties, is essentially legal in its nature and may be asserted only in a court of law; and the attempted exercise of jurisdiction by a court of equity, and the consequent denial of the right of trial by jury, is contrary to the Constitution of the United States.

Authorities.

Bayless vs. Traveler's Ins. Co., 113 U. S., 316.
Encl. U. S. Reports, Vol. 7, pp. 754-755.
Hariat vs. Ballon, 9 Pet., 156.
Hodges vs. Eason, 106 U. S., 408.
Kountze vs. Omaha Hotel Co., 107 U. S., 378.

THIRD POINT.

The appearance of appellant subsequently to the decree, by motion to vacate, did not operate to give the court of equity jurisdiction to render a judgment on the bond, for the remedy at law is plain, adequate and complete. This is a fundamental objection and may not be waived.

AUTHORITIES.

Allen vs. Pullman Co., 139 U. S., 662.
Graves vs. Boston Marine Ins. Co., 2 Cranch, 419.
Hipp vs. Babin, 19 How., 271.
Morgan vs. Beloit, 7 Wall., 613.
Oelrichs vs. Spain, 15 Wall., 228.
Parker vs. Winnipiseogee, 2 Black, 545.
Root vs. Lake Shore, etc., R. Co., 105 U. S., 189.

FOURTH POINT.

The mere filing of the motion to vacate the decree did not operate as a waiver of the right of trial by jury.

AUTHORITIES.

Barney vs. Schmeider, 9 Wall., 248.
Hodges vs. Eason, 106 U. S., 408.
Revised Statutes, Sec. 649.

FIFTH POINT.

Under no head of chancery jurisdiction can a court of equity of the United States sustain a bill to obtain a decree for the payment of money only when a like recovery may be had at law.

AUTHORITIES.

Ambler vs. Choteau, 107 U. S., 586.
Buzard vs. Houston, 119 U. S., 352.
Litchfield vs. Ballon, 114 U. S., 190.
Parkersburg vs. Brown, 106 U. S., 500.

THIRD SPECIFICATION.

The decree appealed from was erroneous in so far as it directed the issuance of execution against appellant for that the appeal bond herein did not secure, and was not intended to secure, the payment of the amount of the original decree or any deficiency thereupon, but operated only as an indemnity against damages and costs by reason of the appeal. (First Assignment of Error, Record, pp. 49-50).

FIRST POINT.

A supersedeas bond given on an appeal from a decree of foreclosure operates only as indemnity against damages by reason of the appeal, and does not operate to secure the payment of the amount of the decree or any deficiency that may remain after the application of the proceeds of the property adjudged as security therefor.

AUTHORITIES.

Crane vs. Buckley, 203 U. S., 443.
Dexter, Horton & Co. vs. Sayward, 79 Fed., 237.
Louisville, etc., Co. vs. Pope, 74 Fed., 1.
Kountze vs. Omaha Hotel Co., 107 U. S., 378.
Supreme Court Rule 29.
The Sydney, 47 Fed., 261.

FOURTH SPECIFICATION.

The decree appealed from was erroneous in so far as it directed the issuance of execution against appellant for that there had not been a judicial ascertainment of the amount of such deficiency, and the court had no control over said proceeding, except to execute the decree affirmed by the Appellate Court. (Eighth Assignment of Error, Record, p. 52).

First Point.

At the time of the rendition of the decree on the mandate there had not been a judicial ascertainment of the fact or amount of the deficiency, and, therefore, the decree was void. (Trans., pp. Decree 31; 32. Marshal's return).

Authorities.

Baird vs. McCorkey, 20 Wis., 297.
Bank of Rochester vs. Emerson, 10 Paige, 359.
Clapp vs. Maxwell, 13 Neb., 542.
Cobb vs. Thornton, 8 How. Pr., 66.
Hastings vs. Alabama, etc., Co., 124 Ala., 608.
Hill vs. Young, 8 S. E., 938.
Jones on Mortgages, Sec. 1709.
Mickle vs. Mayfield, 42 Mich., 304.
Moore vs. Shaw, 15 Hun., 428.
Parr vs. Lindler, 18 S. E., 836.
Presley vs. McLean, 80 Ala., 309.
Rache vs. Dorcher, 44 N. Y. Sup. Ct., 150.
Sayer vs. Elyton, 73 Ala., 85.
Tormey vs. Gerhart, 41 Wis., 54.
Winston vs. Browning, 61 Ala., 80.
Equity Rule 10.

SECOND POINT.

In the absence of Equity Rule 10, a Federal court of equity had no power to render a deficiency decree in a foreclosure suit; and that rule authorizes such a decree only after a judicial ascertainment of the fact and amount of the deficiency. This can be done only after sale of the mortgaged property.

AUTHORITIES.

Equity Rule 10.
Kountze vs. Omaha Hotel Co., 107 U. S., 378.
Noonan vs. Bradley, 2 Black, 499.
Orchard vs. Hughes, 1 Wall., 77.

FIFTH SPECIFICATION.

The decree appealed from was erroneous in so far as it directed the issuance of execution against appellant for that in its bill filed in this cause, complainant sought a judgment as at law for any deficiency that might remain due on said decree after the application of the proceeds of the sale of the mortgaged property, and such judgment was not awarded it; therefore, the right to a deficiency judgment and execution therefor has been adjudged against it, and the court had no control over the decree after adjournment of the term. (Fifth Assignment of Error, Record, p. 52).

FIRST POINT.

Where complainant, in a foreclosure suit, seeks a decree for a deficiency, and the court does not award it, nor retain the case for further orders, the right to such a decree is *res adjudicata.*

AUTHORITIES.

Durant vs. Essex County, 101 U. S., 555.
Kingsbury vs. Buckner, 134 U. S., 650.
Sibbald vs. United States, 12 Pet., 88.

SIXTH SPECIFICATION.

The decree appealed from was erroneous in so far as it directed the issuance of execution against appellant for that the effect of said decree was to amend and add to in a material respect the foreclosure decree, and was without authority of law because the term of court at which it was rendered had long since adjourned, and the court had no control over it after adjournment. (Sixth Assignment of Error, Record, p. 52).

FIRST POINT.

After the adjournment of the term at which a judgment or decree is rendered, the trial court has no power to amend or add to such judgment or decree, in any material respect. It can neither add to nor take from the rights of the parties as there fixed.

AUTHORITIES.

Durant vs. Essex County, 101 U. S., 555.
In re Potts, 166 U. S., 263.
In re Sawyer, 21 Wall., 617.
In re Washington, etc., R. Co., 140 U. S., 91.
Sibbald vs. United States, 12 Pet., 88.

SEVENTH SPECIFICATION.

The decree appealed from was erroneous in so far as it directed the issuance of execution against appellant for that complainant's right to an execution for the deficiency

being denied it, its only remedy was by appeal from the foreclosure decree. (Seventh Assignment of Error, Record, p. 52).

FIRST POINT.

The failure of the court, in a foreclosure suit, to award the complainant a decree for deficiency, is a judicial error and may, after adjornment of the term, be corrected only by appeal.

AUTHORITIES.

Barron vs. Kenedy, 17 Cal., 574.
Bronson vs. Schulten, 104 U. S., 418.
Leavenworth vs. C. R. I. & P. R. R. Co., 134 U. S., 688.
Phillips vs. Negley, 117 U. S., 665.
Putnam vs. Day, 22 Wall., 60.

EIGHTH SPECIFICATION.

The decree appealed from was erroneous in so far as it directed the issuance of an execution against appellant for that at the time of its entry, the Peoples Light Company, defendant, had been dissolved, and this suit as to it abated; and in as much as no execution can issue against it, none can be issued against appellant. (Ninth Assignment of Error, Record, p. 53).

FIRST POINT.

The dissolution of the Peoples Light Company abated the suit against it. The deficiency decree was therefore void. In the absence of a valid decree for the deficiency against the defendant no decree could be rendered against the sureties, even though otherwise such might be done.

AUTHORITIES.

Pendleton vs. Russell, 144 U. S., 640.
Ransom vs. Williams, 12 Wall., 313.

NINTH SPECIFICATION.

The decree appealed from was erroneous in so far as it directed the issuance of execution against appellant for that the right of the plaintiff to an execution for a deficiency was adjudged against it in this cause, and there being no right to an execution against the defendant, it is in no event entitled to an execution against appellant. (Tenth Assignment of Error, Record, p. 53).

FIRST POINT.

The existence of the right to an execution against the defendant is a necessary prerequisite to an execution against sureties on an appeal bond.

TENTH SPECIFICATION.

The decree appealed from was erroneous in so far as it directed the issuance of execution against appellant and the execution issued under said order is void for that it was tested after the dissolution of the Peoples Light Company, defendant. (Eleventh Assignment of Error, Record, p. 53).

FIRST POINT.

An execution tested after the dissolution of a corporation,—the sole defendant, is void.

AUTHORITIES.

Ransom vs. Williams, 12 Wall., 313.

ELEVENTH SPECIFICATION.

The decree appealed from was erroneous in so far as it directed the issuance of execution against appellant and the execution thereunder is void for that the sale of the mortgaged property operated as a complete satisfaction of the foreclosure decree. (Fourteenth Assignment of Error, Record, p. 54).

ARGUMENT.

The points raised suggest many questions which might be discussed with profit, but to do so would prolong the argument to unnecessary length.

Before entering upon a discussion of the various points, we advert, briefly, to the opinion of the Circuit Court of Appeals.

It seems that in the first question decided, the court entertained a very grave misconception of the foundation upon which the contention of appellant was made to rest. The opinion entirely ignores the question of whether appellant, as a surety on the supersedeas bond, was entitled to notice before a decree should be entered against him. The court treats the subject as though the right of trial by jury alone was involved. Impliedly, at least, the court decided the first question, upon the theory of appellant's submission of the controversy for determination, in the motion filed.

As to whether the decree on the mandate was, as to appellant, due process of law, the question simply was whether the sureties were entitled to notice and hearing before being subjected to judgment against them. Certainly that was the question as presented in *this* case, for it is an appeal from the decree on the mandate itself. It can make no difference how many questions "on the merits" were raised by the motion, the fundamental one that the decree was a denial of notice and opportunity to be heard, and, therefore, violation of the Constitution was raised. Appel-

lant insisted that he was entitled, in the beginning and before any decree should be rendered against him, to notice. This the court say he was not entitled to because he, subsequently to the decree, sought to have it set aside, on this ground, as well as others. This finds no sanction in reason. If the point that appellant was entitled to notice is correct (and there can be no doubt that it is), the result is that the decree on the mandate was simply void. It was void when entered and could not be validated or given life by any action of the court or the parties. The court was called upon to decide the question whether the decree was void for this reason. The effect of the denial of the motion was to adjudge, not that any right had been waived, but that the decree on the mandate was in fact valid. The decree on the motion fixed the *liability* of no one. (Trans., p. 31). It did not attempt to do so. Indeed, as the pleadings stood on the record, the court could do nothing more than it did to fix liability. There was not then, and there has never been, any pleading to sustain a decree against the sureties. There was not then, and there has never been, any effort on the part of appellee to recover on the bond, by any form of action. As far as the record shows, and we must be limited by that, the mandate was filed in the trial court; the trial judge, without application of any kind by appellee, and without notice to any of the parties interested, rendered the decree on the mandate, which directed the issuance of execution, not only against the defendant but against the sureties on the bond. No sort of inquiry made. And yet, the Circuit Court of Appeals say that because an effort was subsequently made to set aside this decree, and the court denied the application, the void decree, was thereby given validity and justified the taking of appellant's property.

The court concedes in the beginning that as an original proposition, the sureties would be entitled to have their liability determined in an action at law on the bond where

they might have a trial by jury, but that the action taken by them to set the decree aside, operated as a waiver of a jury trial.

It is a little difficult to follow the reasoning of the court at this point. If it be true, as the court assumed, that the cause of action on the bond was a legal one, then the court of equity had no jurisdiction, and this jurisdiction could not be conferred by consent of parties. The court was absolutely without power. It could not act. The consent of the parties could not give it a power it did not inherently possess.

Relief will be denied in cases in equity where the remedy at law is plain, adequate and complete, though the question was not raised by defendants in their pleading nor suggested by the counsel in their argument because it is a question of jurisdiction, and no admission of the parties can change the law or give jurisdiction to a court in a case of which it has no jurisdiction. Graves vs. Boston Marine Ins. Co., 2 Cranch, 419. The point is decided in other cases, some of which are: Hipp vs. Babin, 19 How., 271; Parker vs. Winnipiseogee, 2 Black, 545; Root vs. Lake Shore, etc., R. Co., 105 U. S., 189; Allen vs. Pullman Company, 139 U. S., 662; Oelrichs vs. Spain, 15 Wall., 228; Morgan vs. Beloit, 7 Wall., 613.

The mere filing of the motion to set aside the decree on the mandate, is not a waiver of the right of trial by jury. A jury trial may be waived only by agreement of parties, filed with the clerk. (R. S., Sec. 649).

The court decided that a supersedeas bond given on appeal from a decree of foreclosure, operated as security for any deficiency which might exist after applying to the decree the proceeds of the mortgaged property. This question is discussed at length under the Fifth Specification.

Notwithstanding the foreclosure decree simply ascertained the amount due appellee by the defendant, and did noth-

ing more than foreclose the lien and order the property sold in default of payment, the court not retaining the case for any purpose whatever, the court held that an execution might issue for the collection of the deficiency.

Because of the fact that the decree on the motion did not provide for the issuance of an execution, none could issue under it. In as much as the decree on the mandate was void, it would not support an execution. So that, the court was forced to the holding, in order to sustain the proceeding, that an execution might issue under the original decree,—the decree of foreclosure,— for the collection of the deficiency. The idea underlying this is (to draw upon our imagination) that in as much as an execution might issue under the original decree, the direction of the decree on the mandate that execution issue, presented no ground of complaint. The holding amounts to this: Where the decree of foreclosure does not provide for the contingency of a deficiency nor direct the adjournment of the case for further orders, nor direct the issuance of execution, an execution may nevertheless issue; that an order of the court is not necessary.

The contention of appellant is that in such case, the trial court loses jurisdiction of the case at the adjournment of the term, except in so far as to execute the very decree rendered; that when the property was sold in this case, the decree was satisfied; that the failure of the trial court to hold jurisdiction of the case so a deficiency decree might be rendered on the incoming of the report of the marshal, if erroneous, was a judicial error and could be corrected only on appeal.

FIRST SPECIFICATION.

There a few propositions involved in this case, simple, clear and firmly established; and, as we understand, not controverted, and to which only brief reference will be made.

A departure from established modes of procedure,—as a decree of a court without written pleading, renders the decree void. (Windsor vs. McVeigh, 93 U. S., 288). There was no written pleading against the sureties in this case. A judgment or decree of a court against one not a party to the proceeding, without the service of process, or notice, and without hearing, or opportunity of being heard, is not due process of law, and void. The authorities are set out in the brief. In all actions at law where the matter in controversy exceeds the sum of twenty dollars, the defendant is entitled to a trial by jury, unless it be waived in the manner provided by the statute. A court of equity has no jurisdiction to administer relief in any case where there is a plaint, adequate and complete remedy at law.

In the light of these propositions, was the decree on the mandate valid,—was it a due process of law?

The only answer is that it is void,—it is not due process of law. The Court of Appeals say this in substance:

> "We 'assume' that the sureties on the supersedeas bond had the right to have the question of their liability adjudicated in an action at law in which they could have claimed the right of trial by jury, but this cannot relieve in this case for the reason that appellant, after the obnoxious decree was rendered, applied to the court which rendered it, to have it set aside. He raised questions on the merits of the controversy which invited the court to determine the question of liability. The court, therefore, had the right to do this."

It is a new and novel proposition that one who has been deprived of a right guaranteed to him under the Constitution,—against whom a void judgment has been rendered,—"waives" the right by afterwards appearing in court to demand that it be protected. It is well to bear in mind just here that this is an appeal from the decree on the mandate, and the question of appearance cannot affect it, whatever

the effect may be on the companion case (No. 419, October Term, 1916) now in this court and submitted with this.

The opinion of the Circuit Court of Appeals discloses that there was an appeal from the decree on the mandate. That is this case. Appellant sought, by motion, in the trial court, to have the decree vacated, and this being denied he appealed. That is No. 419, (October Term, 1916), on the docket of this court. It also appears that after the levy of the execution, issued under the decree on the mandate, appellant sought, by bill, to enjoin the sale of his property and the injunction being denied, he appealed, (No. 2834, styled at the beginning of the opinion), and pending these appeals, he paid the amount of the decree under protest. This last appeal was *dismissed* because appellant, "under protest" paid the judgment to prevent the sale of his property. There was nothing else he could do to relieve himself from this unlawful proceeding. Yet, because he did these, he "waived" his constitutional protection.

The Court of Appeals decided that because appellant filed a motion to vacate the decree, he "voluntarily submitted the question of his liability to the court which rendered the decree," and in consequence waived the one point which rendered the decree an *absolute nullity* from the beginning.

It may first be observed that the trial court was only "invited" to pass upon the question of the validity and regularity of the decree on the mandate. (Trans. in No. 419, p. 43, Prayer of Motion). The record does not show that appellant "elected to abide by the decision." The Court of Appeals, moreover, decided upon the facts before them, that he paid the amount of the decree under protest. He "abided" under compulsion; he paid as the result of duress.

The principle invoked by the Court of Appeals that one who makes a general appearance in a court and invokes its decision as to the merits of a claim against him, cannot limit or qualify his appearance and is bound by the decree

against him, is too well settled to admit of controversy. But it has no application here. It is likewise true that if appellant had submitted to, without appeal from, the decree denying the motion, his right to question the decree on the mandate in a subsequent proceeding, would have been lost; the questions would then have passed into the realm of *res adjudicata*, for the reason that by denying the motion, the trial court adjudged that the decree on the mandate was *valid* and *had been regularly rendered*. (Lawrence vs. Nelson, 143 U. S., 215). But he did not so abide the decision. The case here is exactly the same as though the motion had never been filed.

The error of the Court of Appeals, in the application of the principle, lies in the fact that *after the court acquired jurisdiction* of the sureties it did not attempt to "decide the question and provide for the enforcement of its decree by proper process." Various objections were made to the validity and regularity of the decree on the mandate, and if any one of those objections were well taken, it should have been vacated. The questions presented were, was the decree on the mandate valid, and was it regular and sustained by the facts as they were admitted and appeared?

A case might have been made in the trial court which called for an application of the principle relied upon by the Court of Appeals. Undeniably, by filing the motion to vacate, the sureties submitted themselves to the jurisdiction of the court in such a way that the court might determine all questions raised, and, if, after doing this, appellee had, by proper pleading, sought to recover on the bond, and upon hearing, after notice, the court had rendered a decree against them for the deficiency, the principle would apply. The court would have jurisdiction of the person, but not necessarily of the subject matter. If in the case instanced they had submitted to hearing without demanding a trial by jury, they might be held to have waived it. The action being, as the Court of Appeals decided, an action on the

bond,—a common law action,—the case would, on motion, be transferred to the law docket and a trial by jury had. (Equity Rule 22). However, there was no pleading filed asserting the liability of the sureties. There never was any basis in pleading for a decree on the mandate, against the sureties.

Moreover, the decision reduces itself to the proposition that the *grounds* relied upon in the motion are the controlling elements. The court states some of the points raised,—non-liability on the bond, *res adjudicata* and satisfaction of the foreclosure decree. These, the court say, "invited" the trial court "to pass on the *merits* of the question," with the result that the court determined the merits. The corollary of this is that if appellant had raised no question on the "merits," but confined himself to the constitutional questions, the result would have been different. He would then not have waived a trial by jury. So that the nature of the grounds asserted controls rather than an appearance. Yet, the constitutional questions are here raised by appeal from the decree on the mandate itself, where there is no character of *pleading*, either in support of or in attack on the decree. It must be remembered, too, that if these questions on the merits had not been raised, a decision against appellant on the constitutional questions, would none the less, have been an adjudication on the questions not raised, because they might have been presented. An adjudication precludes all questions which might have been raised.

The decree on the motion simply *overruled* it. It did not *fix*, nor did it attempt to fix, *the liability* of the sureties on the bond, (Trans., p. 31), but merely affirmed that which had previously been done. It adjudged the regularity and validity of the prior proceedings. It did nothing more. This, of course, implied a determination that the sureties were liable on the bond. Without pleading other than that of appellant, the court could do nothing more than affirm

or set aside the previous decree. After appearance, the appellee did not seek a decree against the sureties on the bond. There was no decree against the sureties *after* they submitted themselves to the jurisdiction of the court; and this is essential to a correct application of the rule invoked, as shown by Windsor vs. McVeigh, *Supra.* The court was called upon to determine the validity of the decree on the mandate. It determined that it was valid, and that is the question now presented to this court. In this connection, it is important to remember that the execution under which the appellant was required to pay, issued *prior to the decree on the motion.* The decree overruling the motion did not authorize or direct the issuance of an execution. (Record, pp. 57-58). The execution, therefore, was void because issued pursuant to the void decree on the mandate.

The effect of the decision is that notwithstanding the decree on the mandate was absolutely void, the decree overruling the motion validated, vitalized and gave effect to it. A decree which this court has said is not entitled to "respect in any other tribunal,"—"a mere arbitrary edict clothed in the form of a judicial sentence," (Windsor vs. McVeigh, *Supra*), is thus given the same effect as if rendered by a court in due recognition of those fundamental maxims so firmly fixed and sustained in the judicial structure of all civilized States.

In Wetmore vs. Karrick, *supra,* the invalidity of the judgment resulted from the fact that a previous orden of dismissal discharged the defendant from court. The jurisdiction was therefore lost.

In Reynolds vs. Stockton, *Supra,* the receiver was properly served with process, appeared and answered. A final judgment was rendered, with reservation of certain questions. Subsequent proceeings were had and a *new and different cause of action* asserted against the receiver. Notice of this was served on his attorney of record. Judgment was

rendered against him. It was held in a collateral proceeding, that this judgment was void.

In Hovey vs. Elliott, *Supra*, after appearance by the defendants they were adjudged in contempt of court and their pleadings stricken out as punishment. The subsequent judgment against them was held void.

In Windsor vs. McVeigh, *Supra*, and Windsor vs. United States, *Supra*, the defendant's pleadings were stricken out because he was "an alien enemy." The subsequent judgment against him was held void.

Scott vs. Ellery, 142 U. S., 381, was a bill to vacate a decree for a deficiency in a foreclosure case. The decree was rendered against the defendant *without notice*. The court in the foreclosure decree had *retained control of the case for further orders*. The contention of Scott was that by this reservation, Ellery was continued in court and that the court had jurisdiction to proceed without further notice. The court held otherwise and that the judgment was void. It will be observed that the bill raised the question of jurisdiction (as it was by the motion in this proceeding), and Ellery pleaded (and it raised an issue on the "merits") his discharge in bankruptcy. No one supposed that by filing the bill to vacate the decree, Ellery waived anything. On the merits there was no doubt of his liability for the deficiency, but the question of liability did not effect the question of jurisdiction. That is exactly this case. Had the decree in that case been against Ellery there is no doubt but that it would have been reversed by this court. The court could not, and would not, inquire into the question of liability, and finding that he was liable, affirm the judgment notwithstanding it was rendered without notice and by a court at a time when it had no jurisdiction to do so. No one would suppose that the filing of the bill was a waiver of the objection to the jurisdiction as originally exercised. The difference in the proceeding there and that followed here

is that in the first a bill was filed to vacate the decree, and here the less formal motion was filed. The difference is one of form only.

It could not be held that if in the proceedings in the Wetmore case, the defendant had sought by motion to vacate the void decree, and there had been an order simply overruling it and an appeal from that order, such order would have validated the previous judgment on the verdict. If, however, the plaintiff, after the defendant appeared, had sought a judgment on the verdict and the court had awarded it, *that* judgment would have been valid, but the original judgment would still be void. And so here, if after the motion was filed, appellee had sought a judgment on the bond and the court had awarded it, it would have been valid if the court had power to render such judgment. But that does not mean that the former decree was any the less invalid.

If the principle applies in this case, it applies equally to all others, and therein lies consequences of such gravity and considerations of such importance, as to at once challenge the serious attention of this court.

Suppose one files a bill to recover a pecuniary decree and to foreclose a mortgage. There is no service of process and no appearance by the defendant. A decree is rendered in favor of the complainant. The defendant appeals but before doing so he files a motion for a rehearing to have the decree vacated, in which he sets up that the decree was rendered without notice and that he has a valid defense,—for instance,—a former decree in his favor. We may say he admits to execution of the obligation to pay and the mortgage. It appears on the hearing of the motion that no process was served and no appearance entered prior to the decree, but that he has *no defense in fact*. The court, however, renders no new decree, but simply denies the motion. What is the status of the defendant in the appellate court,

and what is the question to be decided? Is it not whether, in the first instance, the defendant had enjoyed the privileges vouchsafed him by the Constitution, rather than his waiver of those rights and his liability to judgment? What, we may inquire, is the difference, in legal effect, of an appearance by motion to vacate the decree and an appearance by bill to enjoin its execution? They are both addressed to the same court, allege the same facts, ask substantially the same relief, and are, in fact, as this court has determined, *in the same case.*

The effect of the decision here is to give effect and validity to an admittedly void judgment,—one "not entitled to respect in any other tribunal,"—because of an unsuccessful effort in the trial court, to vacate it. And it must constantly be borne in mind that this was the only court to which resort could be had, in a direct proceeding, to vacate that judgment. A judgment without pleading to support it, without notice to appellant, is vitalized and given effect because he sought relief against it. Not even the legislative power could have authorized this proceeding, and yet it is that the judicial power has sustained it.

> "If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the Government sitting to uphold and enforce the Constitutioin is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs they were created to prevent." (Hovey vs. Elliott, *supra*).

As we have said, if appellee had, after the motion was filed, sought, by appropriate pleadings, to recover on the

bond and appellant had not demanded a trial by jury, he might be deemed to have waived it, and the decree against him would have been due process of law. He was in court after that for all purposes and if the court had jurisdiction of the subject matter it might lawfully proceed. Undoubtedly the court had jurisdiction to vacate the decree.

With the utmost respect for the opinion of the Court of Appeals, it is no sufficient answer to say that the sureties are liable on the bond. "The liability and the right are inseparable.' (Windsor vs. McVeigh, *Supra*). The question is whether that liability has been established in a manner consistent with the Constitution.

It may be that appellant is liable on the bond. It may be that if a mode of procedure consistent with the Constitution had been followed, he would have no ground of complaint. But to say that because he is thus liable, and for that reason, not entitled to appear and defend, is to ignore the plain provisions of the Constitution. The proposition ignores the rule that jurisdiction can be obtained only upon proper notice. (Wetmore vs. Karrick, *Supra*).

Again, to recall a previous statement, the observance of settled modes of procedure is essential to due process of law, and due process of law demands a trial according to such established modes. What is the established mode of procedure in cases such as this? It is an action at law on the bond.

It seems to have been undecided that a Federal court of equity may *not* render judgment on a supersedeas bond in this character of case, but the mere fact that "damages" only are recoverable on the bond seems to impress the case as one in which the court has no power to administer relief. On the other hand, it is significant, and a circumstance of not a little import, that in the reported cases, in the Federal courts, we find only two classes, in both which the relief was granted by the *court of law.* (1). The cases of pro-

ceedings by action at law on the bond. (Kountze vs. Hotel Co., *Supra;* Supervisors vs. Kennicott, 103 U. S., 554; American Surety Co. vs. North Packing & Provision Co., 178 Fed., 810; Wood vs. Brown, 104 Fed., 203; Rosenstein vs. Tarr, 51 Fed., 368; City of Clarksdale vs. Williamson, 194 Fed., 412). (2). The cases proceeding upon rule or motion. (Hariat vs. Ballon, 9 Pet., 156; Gordon vs. Third National Bank, 56 Fed., 790).

In all these cases the proceeding was on the law side. In some of them the bond was given on appeal from a decree in equity. (Kountze vs. Hotel Co., Supervisors vs. Kennicott; American Surety Co. vs. North P. & P. Co.; Rosenstein vs. Tarr and Wood vs. Brown). These cases establish the mode of procedure which may not be departed from. The proceeding upon motion in Hariat vs. Ballon was justified and sustained under an Act of Congress conforming the practive in the Federal courts in Louisiana, in actions at law, to the practice in the State court, and under the latter the mode followed was recognized and sanctioned. The same principle underlies the decision of Gordon vs. Bank, *Supra.*

SECOND SPECIFICATION.

Under this specification appellant contends that the cause of action on a bond given on an appeal from a foreclosure decree against the sureties, is legal and may be asserted only in a court of law, and the attempted exercise of jurisdiction by a court of equity, and the consequent denial of the right of trial by jury, is contrary to the Constitution of the United States.

The Circuit Court of Appeals decided that this objection could not avail appellant because his subsequent appearance by motion to vacate the decree, operated as a waiver of a trial by jury.

There are two insuperable objections to this position.

First, a waiver of trial by jury can never be implied. The Constitution gives the right, and the Statute, (Sec. 649), prescribes the only procedure by which it may be waived,—by an agreement in writing filed with the clerk. The right, of course, may be waived, but every reasonable presumption should be indulged against the waiver. (Hodges vs. Easton, 106 U. S., 408; Barney vs. Schmeider, 9 Wall., 248).

Second. The Statutes, (Sec. 723), provides:

> "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

This section is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedies. (Boyce vs. Grundy, 3 Pet., 214; Whitehead vs. Shattuck, 138 U. S., 150).

If it be conceded that the sureties on a bond such as the one given in this case, are liable to any extent, the remedy at law on the bond is plain, adequate and complete. The action would be one for the recovery of money only. Even if a pleading had been filed by appellee seeking a recovery on the bond, whether for the deficiency or for those elements which this court has decided are recoverable, the action would none the less have been an action for the recovery of money. It is almost a reflection on the learning of the court to cite authorities to show that under no head of chancery jurisdiction can a court of equity of the United States sustain a bill to obtain only a decree for the payment of money when a like recovery may be had at law. With apologies to the court, however, we cite: Parkersburg vs. Brown, 106 U. S., 500; Ambler vs. Choteau, 107 U. S., 586; Litchfield vs. Ballou, 114 U. S., 190; Buzard vs. Houston, 119 U. S., 352.

This question affects the jurisdiction of the court. Jurisdiction may not be enlarged by agreement of parties, nor by "waiver" or estoppel. Yet, the Court of Appeals decided that by this alleged act of "waiver," jurisdiction was conferred upon a court of equity to render a decree for the payment of money only, as a penalty on a bond, and also that appellant waived a trial by jury.

Undoubtedly, if appellee suffered any damages (as that word is defined in Kountze vs. Hotel Co., 107 U. S., 378) by reason of the former appeal, the sureties on the bond are liable. The action would be one for damages.

It will, no doubt, be argued that there was no matter of fact involved which would require a trial by jury. This upon the assumption that the sureties are liable for the entire deficiency. The answer is this:

> "It is a denial of the constitutional right of trial by jury for a court, without a waiver of the right, to substitute itself for the jury, and passing upon the effect of the evidence, to find the facts involved in the issue and render judgment thereon. (Bayless vs. Travelers Ins. Co., 113 U. S., 316, 320, 321; Hodges vs. Eason, 106 U. S., 408, 412). Even if all the facts essential to a recovery are undisputed, or if they so conclusively establish the cause of action as to authorize the withdrawal of the case altogether from the jury, by a preemptory instruction to find for plaintiff, it is still necessary that the jury should make its verdict albeit in conformity with the order of the court." (7 Encl. U. S. Rept., p. 761).

If direct authority be needed to sustain the point that the cause of action on such a bond is legal, it is found in Kountze vs. Omaha Hotel Co., 107 U. S., 378.

It may be that if there were a statute or rule of court empowering the courts of equity to render a decree on such a bond, without a trial by jury, the signers would be deem-

ed to have waived such trial. But there is no such statute or rule. In Hariat vs. Ballon, 9 Pet., 156, the court said:

> "The principal point relied on seems to be that the party was entitled to a trial by jury, and that no such summary judgment is authorized by law. Whether this objection is well founded depends upon the Act of Congress of the 26th of May, 1824, for the regulation of practice in the District Courts of Louisiana."

It was held that the rule which authorized the proceeding being authorized by the express provision of the Act, a trial by jury was not necessary. If it be true that the question *depended*, as this court decided, upon the Act of Congress, then, in the absence of such an act the proceeding could not be sustained with due regard to this provision of the constitution.

At the conclusion of the argument under the First Specification we referred to the cases in which a recovery has been sought on bonds of this character showing that all of them were either, (1) actions on the bond, or (2) upon rule or motion on the law side. As there pointed out, it seems not to have been decided that a Federal court of equity may not render judgment on a supersedeas bond in this character of case, but the mere fact that "damages" only are recoverable on the bond, seems to impress the case as one in which the court has no power to administer relief. Certainly the only judgment that can be rendered on such a bond is for the recovery of money. The legal remedy then is plain, adequate, and complete.

It was expressly decided by this court, however, that in the absence of a statute or rule of court authorizing it, a court of equity has no power to issue an execution to enforce the payment of a deficiency in a foreclosure suit. (Noonan vs. Bradley, 2 Black, 499; Orchard vs. Hughes, 1 Wall., 77). By what authority, then, may it act to render

a decree against *sureties* on an appeal bond in such a case, and direct the issuance of execution therefor? By an equity rule, the Federal district courts may order execution for the collection of a deficiency, but this is by *virtue of the rule*. The rule was adopted to meet the conditions held in Noonan vs. Bradley; the rule, however, was not intended to change the nature of the decree of foreclosure and sale. (Kountze vs. Omaha Hotel Co., 107 U. S., 378).

THIRD SPECIFICATION.

A supersedeas bond given on an appeal from a decree of foreclosure operates only as indemnity against damages by reason of the appeal and does not operate to secure the payment of the amount of the decree or any deficiency that may remain due after the application of the proceeds of the property adjudged as security therefor.

The decree appealed from directed the issuance of an order of sale, as in the original decree provided, directed to the marshal commanding him to sell the mortgaged property "to satisfy said judgment, interest and cost, and it is further ordered that in the event said property does not sell for sufficient amount to satisfy said judgment, interest and costs, the clerk of the court issue execution against the defendant and sureties on the appeal bond herein, Clark Pease and Gust Heye, for any deficiency that may remain." (Records, pp. 31-32).

In Kountze vs. Omaha Hotel Co., 107 U. S., 378, it was decided that—

> "an appeal bond in an ordinary foreclosure suit * * * does not operate as security for the amount of the original decree, nor for interest accruing thereon pending the appeal; nor for the balance due after applying the proceeds of the mortgaged premisses." (Syllabus).

In that case the court construed the word "damages" as used in the Statute (Sec. 1000), prescribing the conditions of a supersedeas bond. It determining its meaning, reference was made to the earlier Acts of Congress, to the common law on the subject of writs of error, various Acts of Parliament, the Acts of the Legislature of the several States and the previous decisions in this court. All the learning on the subject was there assembled and discussed. The conclusion was that the bond in such a case did not operate as security for the debt or the deficiency.

Undoubtedly this was a suit on mortgage, as that term is used in the 29th Rule of this court and the 13th Rule of the Circuit Court of Appeals. It was an "ordinary foreclosure suit."

After referring to the statute and the 13th Rule of the court, the Court of Appeals say that—

> "The bond in question was conditioned as required by the quoted provision of the statute. The decree which was so superseded was one for the payment of money. The breach of the condition of such a bond given in such a case entitled the obligee to recover, not only compensation for the delay arising from the appeal, but also the *amount of the decree appealed from, so far as the latter directs the payment of money by the appellant to the appellee.* * * *
>
> "Nothing contained in Rule 13 of this court can be given such effect as to prevent the bond standing *as security for the superseded decree for the payment of money, at least in so far as that decree is not otherwise secured.* * * * The liability on a bond which operated to supersede such a decree as the one under consideration would not extend to *'all damages,' if it did not cover so much of the decree for the payment of money as was left unsatisfied after the application to the decree of the amount realized on the sale of property subjected to a lien and ordered to be sold.*"

By way of argument, to distinguish this from the Kountze case, the court say that—

> "The bond under consideration in that case was given on an appeal from an ordinary foreclosure decree. It was distinctly pointed out in the opinion rendered in that case (107 U. S., 393) that the decree appealed from was not a personal one for the debt which the mortgaged secured, and that the personal liability of the debtor could have been enforced while the appeal from the foreclosure decree was pending. Not so here, where the effect of the bond under consideration was to supersede the decree as a whole, not merely the part of it which decreed a sale of the property found to be subject to a lien, but the part of it which ordered the payment of money by the appellant to the appellee."

This argument is predicated upon the idea that there was, in this case, a personal decree *enforceable by execution* and because execution was stayed, the sureties are liable for the deficiency, notwithstanding it was a "ordinary foreclosure suit." The necessary implication from the last quoted sentence is, that a defendant might appeal from that part of the decree which awarded foreclosure and leave the personal liability to be enforced by *execution*. Furthermore, as we shall indicate later, the court evidently misread the Kountze case.

Of course it is needless to argue that a decree for the payment of money, enforceable by execution, against the defendant, is essential to the rendition of a deficiency decree against the sureties on the appeal bond, but it does not follow that because an execution may issue against the defendant, the sureties are liable.

The form and essential elements of the decree of foreclosure and sale are stated in Chicago etc. Ry. Co. vs. Fosdick, 106 U. S., 47. In Noonan vs. Bradley, 2 Black., 499, and Orchard vs. Hughes, 1 Wall., 77, it was decided that in the absence of a rule, the Federal courts of equity did

not have power to render a decree for deficiency in a foreclosure suit. The decision went to the power and jurisdiction of the court, and not to the manner of its exercise. The court did not have the power, in such a case, to render a deficiency decree. In that state of the law, the plaintiff was required to institute a separate action in a court of law to recover the balance of his debt. To obviate the necessity of this, the Supreme Court adopted Equity Rule 92 (now Equity Rule 10). Kountze vs. Omaha Hotel Co., *supra*. In the absence of the rule the decree of foreclosure and sale, as described in the Fosdick case, was the only decree the court was authorized to render in such a suit. The court, in the Kountze case, took particular pains to say that the rule referred to "has not changed the essential nature of the decree of foreclosure and sale." The rule simply conferred a power, prescribed the time for its exercise and a method for its enforcement. The very language of the rule, that the court may render a decree for the balance that may be found due, of necessity implies that this may be done only after the sale of the property. It is undeniably true that the rule calls for the exercise of judicial power,—in the absence of which the court could proceed no further than order the sale and confirm it. This is the power under which the court may render a decree for the payment of money, enforceable by execution. There is no authority for the exercise of the power before the sale. The course pursued in the Kountze case is that universally practiced in the Federal courts. The property was ordered sold by a commissioner, with directions that he report the sale for confirmation. Upon the coming in of the report, the sale was confirmed and there being a deficiency, a decree was rendered for its recovery with execution for its collection. This is a very convenient and simple practice and need confuse no one. The rule must be construed in the light of the practice in foreclosure cases, of requiring a sale by a master or commissioner with the

direction stated, and so construing it it is even more apparent that the deficiency decree may be rendered only after the sale.

The decree of foreclosure contained no direction to the marshal to report his action to the court under the order of sale, nor did the court retain the case for the purpose of rendering a deficiency decree or for any other purpose. (Record, p. 23). If, indeed, it had gone so far as to order the issuance of execution for the deficiency, it would have been, to that extent, a mere nullity (7 Encl. U. S. Reports, pp. 661-662), and subject to attack at any time and in any place (Reynolds vs. Stockton, *supra*).

The Court of Appeals decided that even though there was no direction in the foreclosure decree for the issuance of execution, such execution might issue. Why, we may inquire, was it deemed necessary to provide in Rule 10 for the issuance of execution as under Rule 8, if such an execution could issue without an order of the court? The *court* was empowered to do the things specified in Rule 10. The clerk is not the court, but according to the decision here, the clerk was authorized to issue an execution for the collection of the deficiency even though the court did not so order. The Court of Appeals say that the bond operated to secure "the amount of the decree appealed from, so far as the latter directs the payment of money by the appellant to the appellee. * * * ." For the collection of this, an execution might issue *without an order of the court.* If this be true, then it was never necessary to issue an *order of sale.* It was not essential that the plaintiff should go to the court for anything. He simply goes to the clerk, takes out his execution and proceeds to collect it, and in failure to affect this from the defendant, he may then pursue the sureties on the bond. The fact is, that the enforcement of such a rule, not only overturns the decision of this court, but will operate, in practice, to an entire oblit-

eration of the line of demarkation between legal and equitable proceduce so consistently maintained in this court, and subject courts of equity to imposition and fraud and at the same time deprive defendants of the right of trial by jury in actions at common law. Whenever a defendant is sued on a common law action he is entitled to a jury trial. If there be a mortgage securing the debt, the case is cognizable in equity where the defendant is not entitled to a jury. Now, the court has here established that an appeal bond in a foreclosure case operates to secure the payment of the whole amount of the decree, so far as it "directs the payment of money by the appellant to the appellee," and, even in the absence of an order of the court, the clerk may issue an execution for its collection as under Rule 8. The result is that a creditor may resort to the jurisdiction in equity and have a foreclosure of his lien, the decree necessarily ascertaining the amount due, which, of course is "directed to be paid," and then entirely abandon the foreclosure part of his decree and have satisfaction by execution as under Rule 8 where the decree or judgment is for the recovery of money only. And if he fails in this, he may then pursue the sureties on the appeal bond to the extent of the penalty of the bond, without resorting to a sale of the mortgaged property. He, thereby, is permitted to obtain, from a court of equity, all the relief and the relief which only a court of law has jurisdiction to afford him, namely, a decree for the recovery of money enforceable by execution; without regard to the right of the defendant to a trial by jury in such suit. By this form and mode of procedure, sanctioned by the Court of Appeals, he accomplishes that which the constitution says he may not accomplish. He has deprived the defendant of a jury trial. He has disregarded, with the sanction of the Federal court, the distinction between legal and equitable procedure. He has, in fact, practiced a fraud upon the jurisdiction of the

court, for without the element of foreclosure in his suit the court would not have jurisdiction. We think this court will not tolerate such a practice.

The Court of Appeals distinguishes this and the Kountze case, as follows:

> "It was distinctly pointed out in the opinion rendered in that case (page 393) that the decree appealed from was not a personal one for the debt which the mortgage secured, and that the personal liability of the debtor could have been enforced while the appeal from the foreclosure decree was pending."

The discussion in the Kountze case referred to was of the general nature of the decree of foreclosure and sale, the only decree which the court was authorized to render. The court said that in such a case, the supersedeas does not suspend execution for the debt. This is of course, undoubtedly true, and for the reason that the plaintiff has no right to such an execution by the decree of foreclosure and sale. He only becomes entitled to such an execution after the debt has been established as authorized by Rule 10. It was further said that the decree of foreclosure and sale was not one against the person and cannot be enforced by an execution against goods and lands generally. This is not denied, but the Court of Appeals misunderstood the reason. The reason is that the court has no power, at the time of the rendition of the decree of foreclosure and sale, to authorize such an execution. A deficiency decree cannot be rendered until after the sale (Jones on Mortgages, Sec. 1709, and authorities cited).

In the Kountze case, it is said:

> "The rule of court by which a personal decree may, in some cases, be entered up against the mortgagor for the residue of the debt, after the proceeds arising from the sale of the land has been applied,

in a recent rule, intended to obviate the necessity of a separate action. It has not changed the essential nature of the decree of foreclosure and sale."

The result of this is that a decree of foreclosure and sale is yet what it was in the beginning. It is not a decree against the person enforceable by execution against goods and chattels generally. And this is so regardless of the form of expression used in the decree. The court will delve into the substance and enforce it, and the rights of the parties, regardless of the form.

There is an implication in the opinion of the Court of Appeals that in the Kountze case, this court decided, expressly or by implication, that where a decree of foreclosure and sale is entered against a sole defendant, he may appeal and supersede so much of the decree as awards foreclosure and leave that part for the recovery of money unappealed from, and subject to be enforced by execution. This court intimated no such theory. There is no such thing in legal contemplation as a divisible decree of foreclosure. A defendant may not appeal from that part which awards foreclosure and leave that part for the payment of money to be enforced by execution. The decree must be superseded as a whole or not at all. Any other proceeding would be idle, for notwithstanding the appeal and supersedes, an execution could issue, and, unless other proceedings were had in the trial or the appellate court, even the foreclosed property might be levied upon and sold.

It is established in this case that bonds on appeal where supersedeas is obtained operate as security, regardless of whether the decree or judgment is secured. The second class of cases mentioned in Rule 29 of this court clearly contemplates the contrary, even though we had no decision of the court on the subject. If security was intended, why did not the rule require that the bond should be in any

amount sufficient to secure the payment of *so much of the decree or judgment was was not otherwise secured?*

The decision here ouerturns and renders of no effect the decision in the Kountze case. Instead of the liability of the sureties being made to depend upon the character of the suit, as this court decided, it is now made to depend upon the terms of the decree appealed from, for the only difference in the decree here and the ordinary decre of foreclosure is in the language employed. This court decided that in a foreclosure suit, the bond did not operate to secure the payment of the deficiency. The Court of Appeals decided that it operates to secure the payment of so much of the decree as was *not otherwise secured.*

The commonly used phraseology of a judgment at law is that "plaintiff do have and recover" the amount found to be due. The language generally employed in decrees of foreclosure is that "The defendant is indebted to the complainant" in a certain sum and directs its payment within a stated time, in default of which the mortgaged property shall be sold. This court decided that in the latter the bond does not operate as security. It was decided in Catlett vs. Brodie, 9 Wheat., 553, that the supersedeas bond given on writ of error from a judgment for the recovery of money only, operated as security. Now, we have a situation such as this: If in a foreclosure suit,—a suit "on mortgage,"—the decree is that "plaintiff do have and recover" (as in this case) of the defendant and directs a sale in default of payment, the bond operates as security,—according to the decision here. Nothing is necessary to make the bond operate as security, and thus avoid the effect of the decision in the Kountze case, than to change the form of expression in the decree. The practitioner will have no difficulty in framing his decree and thereby accomplish that which this court has decided was not intended by the statute and rule of the court.

The decision effectually takes away the right of appeal and supersedeas in the most important class of cases. If there be a decree in a foreclosure suit against a railroad company in which the complainant "do have and recover" of the defendant a million or ten million dollars; the defendant may not appeal and supersede the decree and thereby retain possession of its property, without giving a bond to secure the payment of the whole amount of the decree. And, indeed, it may be that the property is in the hands of a receiver,—an officer of the court,—yet the defendant is required to give this security. Obviously this would be impossible, and, therefore, the right of appeal and supersedeas is cut off. Indemnity for loss was what the statute intended, not security for the debt.

It was never contemplated by the rule that the duty should devolve upon the judge taking security on an appeal to enter upon an investigation of the value of the mortgaged property, much less to investigate what the property might bring at a forced sale. If the bond is designed to operate as security for "so much of the decree as is not secured," it is necessary in every case for the judge taking the security to determine the value of the property. There is no method by which this may be done. It is to be done upon formal hearing after notice? If it happens that the judge called upon to act is not familiar with the particular property, how is he to determine what its value is for the purpose of taking security for "so much of the decree" as may not be secured? In practice the judge will require a bond sufficient to secure the whole amount of the decree (as was done in this case) entirely ignoring the 29th Rule of this court. The record in this case shows that the property involved in this suit was purchased for $14,000.00 The judge might very well think from this that the value of the property was sufficient to secure the whole of the decree. The result, however, proved otherwise,—at least, at forced

sale it brought only $1,500.00. And there is no doubt that it would have brought more if the decree appealed from in this case had not been in existence. Appellee, having this decree, was perfectly well satisfied to, from a practical standpoint, abandon the property itself and then make the *sureties* pay the amount of the decree.

The 29th Rule of the court provides that in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin and in *suits on mortgages*, etc., indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property and the costs of the suit and "just damages" for delay, and costs and interest on appeal.

There can be no recovery on such bond for use and detention of the property, unless at the time of the decree the appellee was entitled to possession. In a foreclosure suit the only recovery is for "just damages" for delay. Some of the elements of "just damages" for delay are enumerated by the court in the Kountze case, but the deficiency does not come within the meaning of the term. But the Circuit Court of Appeals say that the liability on the bond would not extend to "all damages if it did not cover so much of the decree for the payment of money as was left unsatisfied after the application to the decree of the amount realized, on the sale of the proprty subjected to a lien and ordered to be sold."

This is what this court decided in the Kountze case was not intended by the statute and rule.

The cases of American Surety Co. vs. North Packing & Provision Co., 178 Fed., 810, 102 C. C. A., 258, and Wood vs. Brown, 104 Fed., 203, 43 C. C. A., 474, cited by the court have no application whatever. The bonds in those cases were given on appeals from decrees for the payment of

money, or, to use the language of the rule, the decree were "for the recovery of money not otherwise secured."

The difference in the cases is apparent. Where the decree or judgment is for the recovery of money NOT OTHERWISE SECURED, the bond operates as security for the payment of the amount of the judgment or decree. (Catlett vs. Brodie, 9 Wheat., 553; City of Clarksdale vs. Williamson, 194 Fed., 412; Gordon vs. Third National Bank, 56 Fed., 790; American Surety Co. vs. North Packing Co., 178 Fed., 810; Rosenstein vs. Tarr, 51 Fed., 367; Wood vs. Brown, 104 Fed., 203).

Where the suit is one in which the property necessarily follows the event of the suit, as in real actions and replevin and in suits on mortgages, or where the decree or judgment is OTHERWISE SECURED, the bond operates only as indemnity for loss by reason of the appeal. (Kountze vs. Omaha Hotel Co., 107 U. S., 378; Jerome vs. McCarter, 21 Wall., 17; Louisville etc. Ry. vs. Pope, 74 Fed., 1; Dexter Horton & Co. vs. Sayward, 79 Fed., 237; The Sydney, 47 Fed., 261).

The Kountze case has been the guide of the courts and the bar for nearly forty years. The question there decided has not since been mooted in this court or in any of the inferior Federal courts. The courts and the bar have been satisfied with its correctness, sustained as it is by all the learning on the subject. It has remained for the Circuit Court of Appeals in this case to override it.

The idea permeating the opinion of the Court of Appeals is that the purpose of the statute was to secure so much of the amount awarded by the decree of foreclosure as was not OTHERWISE SECURED. This is exactly contrary to the decision in the Kountze case, for it only expresses in different language the idea that the bond operates as security for the payment of the deficiency.

The sureties in this case are presumed to have known the law affecting their liability. They are presumed to have known that this court, in the Kountze case said:

> "In view of the authorities, therefore, as far as they go, * * * it is clear that it did not operate as security for the original decree, nor for the interest which accrued pending the appeal, nor by consequence, for the balance of these amounts, or either of them, after applying the proceeds of the mortgage property."

They knew that that was "an ordinary foreclosure suit"; they knew that the measure of liability they assumed by signing the bond was fixed by the statute, the rule and decision of this court; they knew that this court fixed their liability, specifically for (1) "the depreciation of the property in market value pending the appeal; or (2) its deterioration by waste, or want of repair, or the accmumulation of taxes or other burdens; or (3) the use and detention of the property pending the appeal, that is, the rents and profits, or (4) the nonpayment of the costs of the appeal, which accrued in this court." It cannot be that in view of these facts this court can now justify a different measure of liability. There is no claim here that pending the appeal there was a depreciation in market value of the security, nor waste, want of repair, the accumulation of taxes or other burdens, no claim for rents and profits, no claim that the costs on appeal have not been paid (and the record shows payment).

It is for Congress and not the courts to change the law. For nearly forty years the legislative department has had the construction of this court of the statute before it. It had power to change the law. The fact that this has not been done should make this construction of the statute unassailable.

The rule announced in the Kountze case was followed by the Circuit Court of Appeals in Louisville etc. Ry. vs. Pope, 74 Fed., 1, in fixing the amount of a supersedeas bond. Speaking of the liability on the bond, the court said:

> "It (the bond) was not, however, designed to give one a better security than he had by the decree or judgment. It was indemnity, not guaranty of payment, that was sought for. Indemnity for delay, not additional security for the debt."

In Dexter, Horton & Co. vs. Sayward, 79 Fed., 237, the same rule was followed. That was a suit on the law side of the docket, and writs of attachment issued and were levied upon certain real estate. The plaintiff recovered judgment in the trial court to reverse which a writ of error was sued out. The judgment was affirmed by the Circuit Court of Appeals. The attached property was sold and the proceeds applied to the satisfaction of the judgment. There was a deficiency and the plaintiff applied, by motion, for judgment against the sureties on the supersedeas bond for the amount of the penalty thereof, which was less than the deficiency. The motion was denied on the authority of the Kountze case. The court decided that the sureties were not liable. "This is so because the judgment is OTHERWISE SECURED by a lien upon the mortgaged property. * * * In this case the judgment was otherwise secured by the lien of the attachment, which was not disturbed by the proceedings upon the writ of error."

Undoubtedly the judgment there appealed from was one for the payment of money, enforceable by execution; and it is equally certain that execution was stayed pending the appeal.

In Fidelity and Deposit Co. vs. Expansion Metal Co., 183 Fed., 568, the court construed the statute and rule of that court, which is identical with Rule 29 of this court, and

decided that the rule requires that the bond on appeal or writ of error shall cover the costs both of the upper and lower courts, except in cases where from the nature and character of the suit they are otherwise secured.

> "Of the latter character are the Federal cases, cited in the brief of counsel for appellant, such as Kountze vs. Omaha Hotel Co., 107 U. S., 378, which was a suit for the foreclosure of a mortgage, and Dexter, Horton & Co. vs. Sayward, 79 Fed., 237, which was a suit instituted by an attachment against certain property. * * * They come within the qualification or exception mentioned in the rule."

The Sydney, 47 Fed., 261 (in Admiralty) was a proceeding, by motion, on settlement of a decree to be entered upon the filing of a mandate of this court, in case of libel. In the course of the opinion it is said:

> "The liability of obligors upon a supersedeas bond given in a suit to foreclose a mortgage was considered elaborately in Kountze vs. Omaha Hotel Co., 107 U. S., 378, 2 Sup. Ct. Rep., 911, and the true meaning of the term 'just damages for delay' defined as those arising from the deterioration of property pending an appeal, by waste, want of repair or the accumulation of taxes or other burdens upon it."

The last expression of the courts on the subject is in Crane vs. Buckley, 203 U. S., 443. It is there said:

> "The object and purpose of the section (Sec. 1000, R. S.), and the bond given in pursuance thereof is to *indemnify* the party prevailing in the original suit against loss in the respects stated in the bond, by reason of an ineffectual attempt to reverse the holding of the trial court."

There is yet another point upon which the decision of the case might securely rest.

The foreclosure decree (Record, p. 23) did not derect the issuance of execution for the deficiency. It simply provided for an order of sale directed to the marshal commanding him to sell the mortgaged property in the event the amount found due should not be paid within the time fixed. Upon the theory that "the part of the decree which remained unsatisfied after the execution of the part of it which decreed the sale of the property and the application of the proceeds of the sale was 'solely for the payment of money,'" the Court of Appeals decided that, "The appropriate final process for the execution of the decree, so far as it remained unexecuted when the order complained of was made, was such a writ of execution against the defendant as the motion sought to forbid the enforcement of," citing Equity Rule 8. "Plainly it was competent for the court to issue against the defendant in the cause such an execution as was issued." (Record, p. 62).

This, it will be observed, carries out the idea that there was a decree for the payment of money *enforceable by execution*. Obviously, if the foreclosure decree did not authorize the issuance of a general execution against the defendant, a decree against the sureties would have no foundation. And we say that the foreclosure decree did not authorize the issuance of such an execution against the defendant. And, further, that the court was without jurisdiction to order one.

Did the foreclosure decree authorize an execution for the deficiency? Certain it is that it contains no express direction to that end. If the clerk was authorized to issue an execution without an order of the court, this must be because he possessed the power of enforcing it, without regard to an order of the court.

Bearing in mind the decisions of this court (Noonan vs. Bradley, 2 Black, 499; Orchard vs. Hughes, 1 Wall., 77) that in the absence of a rule, the Federal courts of equity have no power to award execution for the collection of a deficiency in a foreclosure suit, we have the question: In view of Rules 8 and 10 can an execution issue for the collection of such a deficiency without an order of the court?

Rule 10 empowers the court to render a decree for the "balance" found due after applying the proceeds of the sale of the mortgaged property and to enforce the same by execution as under Rule 8 where the judgment or decree is for the recovery of money only. This rule was adopted to obviate a separate action by the plaintiff to recover the deficiency. (Kountze vs. Hotel Company, *supra*). Nothing could be clearer than, (1) an order of the court is necessary before an execution may issue as under Rule 8 for the deficiency; (2) pre-requisite to such an order the court must judicially ascertain, (a) the fact of the existence of the deficiency, and (b) the amount; (3) the time for the entry of such a order is after the sale. Obviously, at the time of the rendition of the foreclosure decree the fact and amount of the deficiency could not be known. The rule determines the time for the rendition of a deficiency decree. The power to render a decree for the "balance" of the debt fixes this. The mere fact that the court is exercising a power conferred by the rule, implies judicial action in determining the fact and amount. The fact that the rule was essential to confer power to order the issuance of an execution necessarily fixes that such order of the court is necessary. A casual consideration convinces that if an execution may issue for the collection of the deficiency without an order of the court, the adopting of Rule 10 was unnecessary. The decision here is that an execution may issue for the deficiency without an order of the court. As if to emphasize this the Court of Appeals quotes from the direc-

tion of the mandate that "such execution and other proceedings he had in said cause as according to right and justice * * * ought to be had."

We are not at this point concerned with whether execution against the defendant was properly ordered in the decree on the mandate. The Court of Appeals placed its decision (as, indeed, it was required to do) upon the ground that an execution for the deficiency might properly issue under the foreclosure decree, and, therefore, it was proper to direct execution against the sureties. In other words, that because the foreclosure decree was one for the payment of money enforceable by execution, the sureties were liable for so much as was not "otherwise secured." If an execution could issue at all it could just as well issue without a sale of the mortgaged property, for there were no restraining words of direction to the clerk.

Furthermore, it seems to be well settled in chancery practice that a decree which merely finds the amount due, orders its payment by the defendant personally liable and provided that, in default of which payment, the mortgaged property shall be sold and the proceeds applied to the satisfaction of the amount found due, is not a personal judgment such as to support an action, or a creditors bill, or authorize a general execution. (27 Cyc., 1756, citing Alling vs. Nelson, 55 Neb., 161, 75 N. W., 581; Bean vs. Whitcomb, 13 Wis., 431; Buckinghouse vs. Gregg, 19 Ind., 401; Conn vs. Rhodes, 26 Oh. St., 644; Cotes vs. Bennett, 183 Ill., 82, 55 N. E., 661; Crawford vs. Nimmons, 180 Ill., 143, 54 N. E., 209; Glover vs. Benjamin, 73 Ill., 42; Gray vs. Tooner, 5 Rich (S. C.), 261; Ridgley vs. Abbott, 79 Pac. (Cal.), 833; Tohman vs. Smith, 85 Cal., 280, 24 Pac., 143).

FOURTH SPECIFICATION.

In the argument under the preceding point, we sufficiently adverted to the question of the effect of Equity Rule

10 and the necessity for a judicial ascertainment of the fact and amount of the deficiency, before a decree may be rendered for its recovery, and its collection as under Rule 8. We there also referred to the authorities to sustain the point that in the absence of a rule, the Federal courts of equity have no power to render a decree for deficiency in a foreclosure case, and deem it an incumbrance of the record to further refer to the points.

The mortgaged property was not sold until May 4th, 1915, (Record, p. 37), while the deficiency decree was rendered February 24th, 1915. (Record, pp. 31-32).

FIFTH, SIXTH AND SEVENTH SPECIFICATION.

We deem it more conducive to a clear presentation of these points, to present them in the brief in the companion case to this (No. 419, October Term, 1916), and at this time, rest on the formal presentation; only directing attention to the consequent proposition that an execution could, in no event, be issued against the sureties on the supersedeas bond, unless one was authorized to be issued against the defendant. And, further, that no change or modification of the original decree could have the effect to enlarge or change the liability of the sureties.

EIGHTH, NINTH AND TENTH SPECIFICATION.

It is too clear for argument that if appellee was not entitled to an execution against the defendant, it can have no relief against the sureties on the appeal bond.

A judgment entered against a corporation after its dissolution is void. (Pendleton vs. Russell, 144 U. S., 640; Ransom vs. Williams, 12 Wall., 313).

There being no valid judgment for execution against the defendant corporation, there could be none against the sureties. This is self evidence for the liability of the sureties

is not, and cannot be, greater than the liability of the principal—the corporation defendant.

ELEVENTH SPECIFICATION.

The only relief decreed in favor of appellee was a foreclosure of its mortgage lien and a sale of the property. When the property was sold, the decree was satisfied. The full benefits of the decree accrued to appellee. There was nothing further to be done to carry the decree into effect,—nothing which called for further process.

In discussing the principal points in the case, we have adverted, more or less fully, to the incidental ones, and, as to the latter, as they seem to follow as a matter of course from the premises assumed and have not heretofore been controverted, no extended argument of them is deemed necessary or proper, and the case is submitted with the foregoing.

It is respectfully submitted that the decrees of the District Court and of the Circuit Court of Appeals are erroneous and should be reversed and appellant prays that this be done.

And in as much as the Circuit Court of Appeals found that pending the appeal appellant paid, under protest, the amount of the deficiency, he further prays that the court by proper order direct the restitution of the money so wrongfully exacted of him, with interest from the date of payment, October 5th, 1915. The principal amount is now in the registry of the trial court and under its control and should be restored by him.

Respectfully submitted,

PERRY J. LEWIS,

Counsel for Appellant.

FRANK H. BOOTH,

Of Counsel.

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(25,103)

No. 820

OCTOBER TERM, 1915.

IN THE

Supreme Court of the United States

CLARK PEASE, APPELLANT,

vs.

RATHBUN-JONES ENGINEERING COMPANY,

APPELLEE.

On Writ of Certiorari to the Circuit Court of Appeals for the Fifth Circuit to Review a Decree of that Court, Affirming a Decree of the District Court of the United States for the Southern District of Texas.

Brief for Appellee.

STATEMENT OF THE CASE.

The appellee does not consider that the statement of appellant in this cause is complete nor accurate in all its details and appellant presents the following:

A suit styled Rathbun-Jones Engineering Company vs. People's Light Company was filed in the District

Court for the Southern District of Texas, said suit being for the recovery of $5360.35, and a further indebtedness of $216.79, under and by virtue of a contract dated August 9th, 1909, whereby the Rathbun-Jones Engineering Company had sold to the People's Light Company certain machinery described in the contract for the sum of $14,000.00; that the amount sued for represented the balance due to said Engineering Company under said contract, and said Company further represented that it had a valid and subsisting mortgage upon the machinery described in said contract to secure the sum of $5360.35, with interest, but that the sum of $216.79 was unsecured.

Plaintiff prayed judgment for its debt and for foreclosure of its mortgage and the sale of the property, and that it have a writ of *fieri facias* for the balance due after the sale of said property. (Tr., 4-23.)

The defendant answered, setting up certain defenses which do not appear in the record of this case and counsel for appellant's statement as to what the answer of the People's Light Company contained, is not sustained by any record in this cause, nor would it be sustained if the record were before the Court for no issue is shown as to the right of appellee to an execution until after the judgment had been affirmed, and the order entered upon the mandate as will be shown hereafter.

In the opinion of the District Court, shown on pages 44 to 49, inclusive, of Transcript No. 419 (a companion case to this), after a discussion of the issues, the District Court stated:

"It follows from the observations made, the views entertained, and the authorities cited, that the complainant is entitled to a judgment in this case and the decree will so provide."

Page 48 of said Transcript shows that the following proceedings were next had:

"To which, the defendant, in open court, excepts and gives notice of appeal to the United States Circuit Court of Appeals, in and for the Fifth Circuit.

"The decree will provide that 90 days from and after the adjournment of the present term of Court be allowed the defendant in which to prepare transcript and perfect the record for appeal.

"I desire in this connection to say that if Court adjourns today, under the Statute, if you want a supersedeas bond to operate as a stay, you must execute same within 60 days from the date of judgment.

"Counsel for Plaintiff: I would like for this judgment to give us a foreclosure of our lien.

"Court: The decree may provide for that. Is there a provision that the title remain in the vendor until the purchase money is paid?

"Counsel for Plaintiff: Yes, sir.

"Court: Well, the decree will cover that."

On page 23, the Court entered a decree that the plaintiff recover from the defendant $6,804.90 with interest from the date of judgment at six (6%) per cent. It was further ordered that the lien of the plaintiff be

established and that if the judgment was not paid within sixty (60) days from date of judgment the property described therein should be sold. The decree further shows that the defendant excepted and gave notice of appeal and that ninety (90) days after adjournment was allowed the defendant therein to perfect his appeal.

The People's Light Company applied for an appeal bond to be fixed by the Court (Tr., 24-26), which bond was fixed at $7500.00. (Tr., 26.) The bond was made which recited the fact that the Rathbun-Jones Engineering Co. had recovered judgment for $6804.90, with interest, from the People's Light Company (Tr., 26-28), and the bond was conditioned as follows:

"That if the People's Light Company shall prosecute its appeal to effect and answer all damages and costs, if it fails to make its plea good, then the above obligation to be void, otherwise to remain in full force and virtue." (Tr., 28.)

This bond was signed by the People's Light Company, principal; Clark Pease, surety, and Gust. Heye, Jr., surety. (Tr., 28.)

The decision of the District Court was affirmed by the Circuit Court of Appeals for the Fifth District, which mandate entered judgment against the principal and sureties for costs and commanded the Lower Court "That *such execution and further proceedings be had in said cause* as according to right and justice and the laws of the United States ought to be had, the said Writ of Error notwithstanding." (Tr., 28-31.) That

after the receipt of said mandate the District Court on February 24th, 1915, entered an order providing for the sale of the property covered by the lien and for execution for the balance against the principal and both sureties. (Tr., 31-32.) That on May 4th, 1915, the machinery was sold at public sale to Clark Pease, one of the sureties. (Tr., 37-38.)

The People's Light Company filed a certificate of dissolution on January 27th, 1915. (Tr., 42-44.)

On October 5, 1915, Clark Pease, as trustee for himself and the other stockholders of the People's Light Company, defendant in the case of Rathbun-Jones Engineering Company vs. People's Light Company, paid the judgment in full to the Clerk of the United States District Court (page 89, Tr., 419.)

Clark Pease and Elenita S. Heye, administratrix, filed a motion in the District Court praying that the order of February 24th, 1915, so far as it directed execution against the principal and sureties be set aside and held for naught, and further prayed for a hearing upon the matters set out in said motion (Tr. 419, pp. 33-44.)

That there was a hearing on said motion (Pages 71-75, Tr., 419), and that judgment was entered overruling said motion (Tr., 47-58), from which order an appeal was taken to the Circuit Court of Appeals of the United States for the Fifth District, where the decree of the District Court was affirmed. (Tr. 63, 228. Fed. 273.)

PLAINTIFF'S FIRST SPECIFICATION, BEING HIS SECOND ASSIGNMENT OF ERROR.

We have no controversy with the proposition of law stated under the First Point of the First Specification in appellant's brief, and cheerfully concede that one who is not in any way a party to litigation, cannot be affected by a judgment or decree, but the point has no application to the present case. The appellant, Clark Pease, signed the appeal bond, thus making himself a party to the litigation, and under the established practice, summary judgment could be entered against him. Article 1627, Revised Civil Statutes of Texas, provides:

> "Whenever the courts of civil appeals, on the trial of cases brought from an inferior court, shall affirm the judgment or decree of such inferior court, or when said courts shall proceed to render such judgment or decree as should have been rendered by the court below and such judgment shall be for the same or a greater amount, or of the same nature, as rendered in the court below, said courts shall render judgment against the appellant or plaintiff in error and his sureties on the appeal bond, a copy of which shall always accompany the transcript of the record; and said courts of civil appeals shall in their discretion include in their said judgment or decree such damages, not exceeding ten per cent on the amount of the original judgment, as the court may deem proper; and the judgment or decree of said courts rendered as contemplated in this article shall be final."

While the Federal Courts are not necessarily bound to follow the State statutes, they usually do so, conforming the substance of the statutes to their own

procedure. While the Texas Statutes provide for a summary judgment against the sureties by the Appellate Court, the Federal Courts have pursued a different policy, and while they have entered summary judgments against sureties, except as to court costs in the higher courts, the summary judgments have usually been entered by the lower court, after the return of the mandate showing affirmance of the cause.

In the case of Richards vs. Harrison, 218 Fed. 135, it is held that the signers of an appeal bond make themselves parties to the suit, and their liability may be enforced by summary proceedings therein.

In the case of Blossom vs. Railway Co., 1 Wallace, 655, Mr. Justice Miller, in delivering the opinion of the Court, said:

> "Sureties signing appeal bonds, stay bonds, delivery bonds, and receipters under writs of attachment, become quasi parties to the proceedings, and subject themselves to the jurisdiction of the court, so that summary judgments may be rendered on their bonds or recognizances."

In the case of Hiriart vs. Ballon, 9 Peters 156, which case has been cited by appellant on a different question, the Court stated:

> "The summary judgment, therefore, was strictly authorized; and the party appellant had no right to a trial by jury. In becoming a surety he submitted himself to be governed by the fixed rules which regulate the practice of the court."

In the case of City of Clarksdale vs. Williamson, et al., 194 Federal, 412, the Circuit Court of Appeals for the Fifth Circuit stated:

"The judgment was for money not otherwise secured, and on suing out the writ a supersedeas bond was given under Rule 13 of this Court. R. S. U. S. No. 1000. The defendants in error in the brief requested the court to enter judgment hereon the supersedeas bond. The practice heretofore prevailing has been to enter such judgment on the bond on motion in the trial court, after the mandate goes down from this court. Gordon vs. 3rd Natl. Bank, 56 Fed. 790; 6 C. C. A. 125. We see no reason in this case for departing from the usual course."

The case of Gordon vs. 3rd National Bank of Chattanooga, 56 Federal, 790-796, is decisive of the question involved under this specification. This was a case arising within the State of Alabama which had a statute very similar to the Texas statute cited above. In that case it was held that a summary judgment might be entered against the sureties on a supersedeas bond, on the affirmance of the judgment and the filing of the mandate. The case of Blossom vs. Railway Co., above cited, is quoted with approval. In this case the Court further stated:

"The statute of Alabama cannot by its own force control the practice of the Supreme Court or other Courts of the United States, on affirmance of the judgment of a subordinate court, to make the judgment of that court the judgment of the Supreme Court, to be directly executed as such. In lieu thereof, its mandate issues to the court a *quo* commanding 'that such execution and proceedings be had in said cause as, according to right and justice and the laws of the United States, ought to be had, the said writ of error notwithstanding.' In substantially similar conditions, on such a mandate, judgment is entered against stip-

> ulators — principal and sureties — in admiralty. Surely, according to right and justice, such judgment ought to be had, not merely for convenience, as has been suggested, but to award bare justice to the party whose right to execution has been suspended by the sureties on the bond. Does any law of the United States forbid? If its express letter is wanting, do not all the analogies of the law of the United States and the logic of the situation require that the defendant in error should have its judgment on the mandate and on the supersedeas bond against all the obligors in the bond?"

The liability of a surety on a supersedeas bond, as in the present case, is fixed by the affirmance of the judgment.

In the case of Babbitt vs. Shields, 11 Otto, 715, 101 U. S. 7-15, the Court stated:

> "The judgment was affirmed in the Circuit Court and the rule is universal that the affirmance of a judgment in the Appellate Court fixes the liability of the sureties, as it shows conclusively that the principal obligor did not prosecute his appeal to effect."

APPELLANT'S SECOND SPECIFICATION, BEING HIS THIRD ASSIGNMENT OF ERROR.

The law of Texas heretofore cited, and which should be followed by the Federal Courts so far as its substance is concerned, provides for entering judgment without a trial against sureties on an appeal bond, and the Federal Court, in entering the order on the mandate, in so far as the sureties are concerned, followed the federal practice as set out in the cases heretofore

cited, which is, when a case is affirmed by the Circuit Court of Appeals, it is the duty of the District Court to take such action as may be necessary to carry out its judgment, and which may be right and proper under all the circumstances.

Aside from these views, however, the appellant in this case has unquestionably waived the right to a trial by jury, not by the mere filing of a motion to vacate, but by his motion to vacate followed up by an actual trial before the court on the merits. The court will note that in the testimony introduced by appellant there does not appear any fact or circumstance showing a lack of notice, but the appellant asked and received an adjudication of all the issues that could be tried as to whether or not the sureties were liable upon the bond; whether or not the order issued on the mandate was proper; whether or not execution could issue; and whether the sureties had notice originally, becomes immaterial in view of the fact that they had an actual hearing under their own allegations and own proof as to the merits of the controversy.

On pages 33 to 43, Tr. 419, appears the motion of Clark Pease, et al., which motion sets out the fact that the appellee herein had obtained a judgment, referred to in the statement in this case, reciting the fact of appellant's petition for an appeal, the court's fixing of a bond, the making of the bond and its conditions, the affirmance of the judgment, the order on the mandate, the issuance of execution, the sale of the personal property, the dissolution of the People's Light Company, the death of Gust. Heye, Jr., one of the sureties, and the appointment of an administratrix, and set out

that the order on the mandate of February 24, 1915, was void for substantially the following reasons:

1. That the bond only operated as an indemnity against damages and costs.

2. That the order as against the estate of Gust. Heye was void.

3. That the People's Light Co., being dissolved, and its affairs being in the hands of trustees, the order was void as to it.

4. That the order was issued without pleading, notice, or hearing.

5. That judgment on the bond can only be recovered by an action at law on the bond.

6. That such order was not authorized by the judgment of the Circuit Court.

7. That the appellee herein was not entitled to a deficiency judgment.

8. That the order on the mandate was void because the term at which the original judgment was rendered had expired.

9. That appellee was not entitled to an execution for a deficiency, not having appealed from the original judgment.

10. That there had been no judicial detremination of the amount of the deficiency.

11. That owing to the dissolution of the People's

Light Co., no execution could be issued against it, and, therefore, none against the sureties.

12. That the right of the plaintiff to an execution for a deficiency was adjudged against it in the trial of the cause.

13. That any execution would be void because tested after the dissolution of the defendant corporation and the death of Gust. Heye, Jr.

In other words, the appellant in this case presented to the District Court for its determination all of the questions of law and fact which might operate to release the sureties and prevent the issuance and enforcement of an execution.

Pages 7-75, Tr. 419, show that appellant herein offered testimony, as follows:

Original bill of appellee, filed June 12, 1912.

Answer of the defendant in said cause.

Original decree entered therein.

Petition for an appeal.

Bond on appeal, showing the condition of said bond, and the sureties thereon.

Mandate of the Circuit Court of Appeals for the Fifth Circuit, affirming the decision of the District Court.

The decree on the mandate, dated February 24, 1915.

The order of sale, issued March 8, 1915.

The return of the marshal, showing the sale of the personal property for $1500.00, which was secured by a lien.

Entries on the Judge's docket, January Term, 1914.

Receipt of costs paid on appeal.

The order appointing the administratrix of the estate of Gust. Heye, Jr., together with the oath and bond of administratrix and approval by the Probate Court.

The execution in the hands of the marshal, issued May 21, 1915, against the principal and sureties. Also copy of dissolution of the People's Light Company.

The order on the motion of Clark Pease, et al., Tr. 57, shows that the motion was argued by the petitioners therein and that "upon consideration thereof and the testimony in support thereof, it is ordered, adjudged, and decreed by the Court, that the motion be in all things overruled."

In other words, the appellant herein did not rely on the want of notice, did not prove want of notice, did not prove lack of pleadings, but presented the legal and equitable defenses, both of law and facts, to the District Court for its determination as to liability of the sureties on the bond and the right of appellee to an execution, and now seeks, after having the liability of the sureties determined against them, to set same aside on the ground that they had no notice or opportunity to present their claims and are entitled to a jury trial.

As was rightly said by the United States Circuit Court of Appeals for the Fifth Circuit, in affirming the decision of the lower court in this matter—

> "The court was invited to pass on the merits of the question, including matters which were set up as barring the asserted right of the plaintiff in the case to have a recovery against the sureties." * * * "One so making a general appearance in a court and invoking its decision as to the merits of the claim made against him cannot so limit or qualify the effect of his appearance as to retain the right of electing to abide by the decision if it is acceptable to him, or of not being bound by it if it is adverse to his contention."

APPELLANT'S THIRD SPECIFICATION, BEING THE FIFTH ASSIGNMENT OF ERROR.

The petitioners herin are contending that notwithstanding complainant in the court below recovered a judgment against the defendant, People's Light Company, for the sum of $6,084.90, with interest thereon at the rate of six per cent per annum from the 9th day of January, 1914; and notwithstanding the defendant executed and filed a supersedeas bond in the sum of $7500.00; and notwithstanding the judgment of the lower court was in all things confirmed, the sureties on the supersedeas bond are liable to the appellee only for the costs of appeal, and that the bond did not cover the amount of the judgment appealed from; though more than $200.00 of said judgment was not even secured by the mortgage. That such contention is erroneous, we think, will be readily apparent from an examination of the authorities. It has been often

held that for the appeal of writ of error to operate as a supersedeas, security must be given in a sum equal to the amount of the recovery. Stafford vs. New Orleans Canal Bkg. Co., 17 How. 238; 15 L. Ed. 102.

The security must, when supersedeas is desired, be sufficient to secure the whole amount of the judgment.

U. S. vs. Dashiell, 3 Wal. 688; 18 L. Ed. 268;

Catlett vs. Brody, 9 Wheat 553; 6 L. Ed. 158.

In the case of Johnson vs. Waters, 108 U. S. 4; 27 L. Ed. 630, a motion for additional security on a supersedeas bond was denied where no personal decree for money was given and the circumstances of the party had not changed since the security was given.

In the case of Wood vs. Brown, 104 Fed. 203, decided by the Circuit Court of Appeals, it is held that:

> "It is an established proposition that a bond which works a supersedeas and is conditioned as required by the Revised Statutes to answer all damages and costs resulting from the allowance of the writ of error to reverse a personal judgment for money, or from an appeal from a decree which directs the payment of money from the Appellant to the Appellee, entitles the obligee to recover upon its breach, not only compensatory damages from the delay arising from the stay of execution or the process, but also the amount due him by the terms of the judgment or decree."

In support of the above proposition, the Court in the case of Woods vs. Brown, *supra,* cited Revised

Statutes, Secs. 1000, 1007 and 1112 and the following cases:

Catlett vs. Brody, 9 Wheat 553; 6 L. Ed. 158;

Stafford vs. Bank, 16 How. 135; 14 L. Ed. 876;

Jerome vs. McCarter, 21 Wal. 17; 22 L. Ed. 515;

Hotel Co. vs. Kountz, 107 U. S. 378; 27 L. Ed. 609;

Rosenstein vs. Tarr, 51 Fed. 370;

Tarr vs. Rosenstein, 53 Fed. 112.

In the case of American Surety Co. of New York, vs. Packing & Prov. Co., 178 Fed. 810, decided by the Circuit Court of Appeals, it is held: That an appeal bond operating as a supersedeas given on an appeal from a decree in equity, which directs the payment of money from the appellant to the appellee, conditioned as required by Revised Statutes, Sec. 1000, and in accordance with Rule 29 of the Supreme Court, and Rule 13 of the Circuit Court of Appeals (150 Fed. XXVIII) to "answer all damages and costs" if appellant fails to make its appeal good, covers the amount of the decree appealed from, as well as damages for delay and costs.

In this case as decided by the Circuit Court of Appeals for the Fifth Circuit, 228 Fed. 273, the Court very clearly stated the effect of Rule 13 of that Court and Rule 29 of this court, as follows:

"Nothing contained in Rule 13 of this court

can be given such effect as to prevent the bond standing as security for the superseded decree for the payment of money, at least in so far as that decree is not otherwise secured. The provision of that rule that 'such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and cost and interest on appeal,' by no means has the effect of preventing a bond which superseded such a decree as the one under consideration, which was for the payment of money and also for a lien on property ordered to be sold and the proceeds applied on the decree, standing as security for the decree for money so far as it remained unsatisfied after the application of the proceeds of the property ordered to be sold. That rule undertakes to furnish a guide for determining the amount of supersedeas bonds in specified cases, and shows that the amount is to be more or less according as the appellee or defendant in error may be liable to be subjected to more or less damage by the superseding or suspension of the execution of the decree or judgment in his favor; but certainly it does not undertake to deprive a supersedeas bond in any case of the effect given to it by the statute of subjecting the principal and sureties to liability 'for all damages and costs' which the appellee or the defendant in error may sustain if the appellant or plaintiff in error 'fail to make his plea good.' The liability on a bond which operated to suspend such a decree as the one under consideration would not extend to 'all damages' if it did not cover so much of the decree for the payment of money as was left unsatisfied after the application to the decree of the amount realized on the sale of property subjected to a lien and ordered to be sold. There is nothing for the surety to complain of in the fact that, before his liability was sought to be enforced, the amount of

the decree which had been superseded was reduced by the application to it of the amount realized on the sale of the property decreed to be sold."

The appellant herein relies upon the case of Hotel Company vs. Kountz, 107 U. S. 378, which case it is claimed, announced a different rule. That case, however, is not against the proposition that we have stated. It merely holds that in an ordinary foreclosure suit, the appeal bond does not operate as security for the amount of the original decree, but only for costs of the appeal and the deterioration or waste of the property. The facts in that case were entirely unlike the facts in the case at bar. That was simply a suit for the foreclosure of a mortgage and resulted in a decree for foreclosure only. The decree was not a decree against the person and could not be enforced by an execution against the goods and lands generally. Upon this point we quote as follows from the opinion in said case:

"The mere delay of the sale for the purposes of an appeal does not operate to the legal injury of the mortgagee. It does not suspend the execution for the debt. He has no right for such an execution by the decree of foreclosure and sale. It is not a decree against the person and cannot be enforced by an execution against goods and lands generally. It is simply a decree for the sale of the land mortgaged in order that the proceeds may be applied to the debt. The amount due is ascertained by the decree, it is true, but only for the purpose of determining the amount of charge on the land."

Further on in the same opinion the Court says:

"It often happens that the debt is not fully ascertained when a decree for sale and fore-

closure is made, as where there are many outstanding bonds, which have to be called in and verified. The sale, in such cases, is frequently made in advance, and the proceeds brought into court for distribution amongst those who may appear to be entitled thereto; all of which shows that a decree of foreclosure is a very different thing from a personal decree or judgment for the debt."

As we have seen, the suit in this case was for the recovery of a personal judgment; personal service was had upon the defendant, and upon trial a decree was rendered in favor of the complainant against the defendant for a specific sum of money, not merely as an incident to the foreclosure of a mortgage, but independently of any such foreclosure. Judgment was given to the complainant for the balance due upon a contract growing out the sale of certain machinery, and it certainly was a judgment for the recovery of money. It is true that as an incident the complainant in the court below, in addition to the prayer for a judgment for the balance due under the contract with the defendant, asked for a decree foreclosing a lien upon certain machinery sold by the complainant to the defendant, and the decree awarded such foreclosure. But it cannot be held that because of this decree for the foreclosure of the lien on this machinery, which, as has been shown by the sale of such machinery under decree, was worth about one-fifth of the amount of complainant's recovery, the defendant is entitled to supersede the entire judgment by giving a sepersedeas bond in an amount exceeding the entire judgment, and that the sureties will only be liable upon the affirmance of the judgment for the costs of appeal. The machinery upon which the complainant obtained a decree of fore-

closure has been sold by the marshal and the amount realized was only $1500.00, while the amount of the complainant's recovery was the sum of $6,804.90, with interest thereon at the rate of 6 per cent per annum from January 9, 1914. Can it be possible that because the complainant obtained a foreclosure upon the property worth $1500.00 and more than $200.00 of the claim was not alleged to be secured in the mortgage, the defendant could supersede a judgment for $6804.90 and interest, and upon affirmance the sureties would only be liable for the costs of appeal? We think not and we think that the authorities clearly establish our contention.

In the case of N. W. Mutual Life Ins. Co. vs. Keith, et al., 77 Federal, 374, where the issue was raised as to the right to an order for a deficiency, the court said:

> "The complainant below appealed, assigning for error in each case the refusal of the Circuit Court to render a judgment for the deficiency. The sole question to be considered, therefore, is whether the appellant was entitled, as a matter of right, to a judgment for the deficiency found to exist in the respective cases, or whether it was discretionary with the trial court to render such a judgment."

> "It is a well-known maxim that a court of equity, having acquired jurisdiction of a case, will proceed to administer full and complete relief, and will not compel either party to seek further relief in another forum if it can avoid doing so. When, therefore, in a foreclosure suit the amount of the mortgage debt has been ascertained and adjudicated, and a sale of the mortgaged property has been ordered, made and confirmed, and the amount realized from such sale is insufficient to pay the mortgage indebtedness, no reason would seem to

exist why the chancellor should be vested with the discretion to refuse to render a judgment for the deficiency. Such action on its part is not beneficial to either party, but simply compels the complainant to resort to a court of law for further relief, which might as well be administered in the foreclosure suit."

APPELLANT'S FOURTH SPECIFICATION, BEING THE EIGHTH ASSIGNMENT OF ERROR.

Article 2000 of the Texas Civil Statutes of 1911 provides:

> "Judgment for the foreclosure of mortgages and other liens shall be that the plaintiff recover his debt, damages and costs, with a foreclosure of the plaintiff's lien on the property subject thereto, and, except in judgments against executors, administrators and guardians, that an order of sale shall issue to the sheriff or any constable of the county where such property may be, directing him to seize and sell the same as under execution, in satisfaction of the judgment, and, if the property cannot be found, or if the proceeds of such sale be insufficient to satisfy the judgment, then to make the money, or any balance thereof remaining unpaid, out of any other property of the defendant, as in case of ordinary executions."

In the case of Ryan vs. Raley, 106 S. W. 750, it is held that the execution would issue for the deficiency whether or not the judgment provided for same.

In issuing the order on the mandate, the court followed the Texas Statute and entered an order providing for the sale of certain property, and for any deficiency for the levy of execution against the prin-

cipal and sureties. In said order the amount of the judgment was set out and was entered in accordance with the decision in Gordon et al. vs. Third National Bank of Chattanooga, 56 Fed., 790; the order on the mandate providing for interest on the total amount from the date of judgment. The escertaining of the amount of the deficiency was not a judicial matter and it was not necessary for the court to ascertain same, after having entered an order requiring the sale of the machinery, which brought the sum of $1500.00, as shown by the transcript heretofore quoted, and it was only necessary to deduct the amount realized from the sale of the machinery, less costs, from the total amount due upon the judgment. The order was consistent with the practice of the Federal Court and in accordance with the Texas Statute, and with equity Rule No. 10, for the order on the mandate simply decreed that execution should issue against the principal and sureties for the money judgment, less the net amount from the sale of the machinery.

Equity Rule 10 provides that "A decree may be rendered for any balance due the plaintiff over and above the proceeds of the sale or sales, and execution may issue for the collection of same, as is provided in Rule 8, when the decree is solely for the payment of money.

In this case the judgment was a judgment for money and to secure the payment of said money in so far as same would do so, the court ordered the sale of the personal property so that execution might issue for the deficiency, and it was unnecessary for the court to wait until after such sale had been made, as this case is not similar to those cases where the bond covered

only deterioration, rents, income, or revenue, and certainly a surety should not complain if the amount of judgment which he has obligated himself to pay is reduced by the sale of the personal property.

APPELLANT'S FIFTH SPECIFICATION, BEING THE FIFTH ASSIGNMENT OF ERROR.

The decree on the mandate was not erroneous for the reasons set out in the fifth specification. A judgment was entered for the entire amount sued for in accordance with complainant's bill in the original case, and it was unnecessary for the original decree to contain a specific direction for an execution, as the right to an execution existed by virtue of a rule adopted by the United States Circuit Court at Galveston, Texas, on October 21st, 1893, which rule is of record on the minutes of said Court in Vol. 7, pages 525 and 526, and now one of the rules of the Southern District of Texas, and reads as follows:

> "Whereas, it has heretofore been the practice in the Circuit Court of the United States for the Eastern District of Texas, in accordance with the provisions of Sections 914, 915 and 916 of the Revised Statutes of the United States, in all matters relating to attachment or other process, against the property of the defendant, including replevy thereof an claim bond, and by execution or otherwise, to reach the property of the judgment debtor, to conform to the laws of the State of Texas, which practice is hereby ratified and confirmed; and in accordance with said sections, all State laws of the State of Texas relating to attachment or other process, against the property of the defendant, and all laws of the State of Texas relating to execution or otherwise, to reach the property of the judg-

ment debtor, in force in the State of Texas by State laws, on the first day of June, 1872, and all State laws thereafter passed relating to such subject matters, are hereby adopted by this Court in like cases heretofore and hereafter filed in the Circuit Court of the United States for the Eastern District of Texas. And this general rule shall be observed in this Court and shall govern the practice in all like cases."

Equity Rule 8, provides in part:

> "Final process to execute any decree may, if the decree is solely for the payment of money, be by writ of execution in the form used in the district courts at common law in actions of assumpsit."

Art. 3714 of the Rev. Civil Statutes of Texas, 1911, is as follows:

> "Execution on judgment of district and county court, issued when.—From and after the adjournment of every district or county court, it shall be the duty of the clerk thereof to tax the costs in every case in which a final judgment has been rendered against the party liable therefor under such judgment, and which have not been paid by him, and to issue execution for the enforcement of such judgment and the collection of such costs. (Act June 4, 1873, p. 209, Sec. 1, P. D. 3772.)

This statute includes all final judgments, and includes foreclosure of liens. Ryan vs. Raley, 106 S. W. 752.

It also existed for the reason that the Federal Court would follow the State Courts as to the enforcement of such judgments. That there is no basis for the contention that any portion of the prayer of complainants

in the original cause was denied is fully shown by the opinion of the District Court, pages 44 to 49, Tr. 419, wherein the court gave judgment for appellee herein without reservation. The affirming of the judgment by the Circuit Court of Appeals of the United States for the Fifth District fixed the liability of the sureties on the supersedeas bond, as shown by the authorities herein under the reply to the first specification of appellant. However, the rule is uniform in this State under the decisions of the State courts that writs of execution may be issued where the judgment declares the rights of the parties.

In the case of Ryan vs. Raley, 106 S. W. 750, it is held that:

> "The judgment need be framed in no particular language, for the right to the issuance of an execution arises from the obligation to pay and not from the judgment."

In the case of Smith vs. Miller, 66 Tex. 74, wherein the Court gave judgment for the amount, but the decree did not provide for execution, the Supreme Court of Texas held that:

> "The judgment declares the rights of the respective parties, and the court below may at any time direct such process or make such orders as may be necessary to carry its judgment into execution."

In the case of Carson vs. Taylor, 47 S. W. 395, affirmed in 95 Tex. 637-650, it is held that:

> "It is not necessary that the judgment should in terms direct the issuance of an execution thereon."

In the case of Richards vs. Harrison, 218 Fed. 134, it is held:

> "A decree of a Federal court of equity for the

payment of money is not invalid because it does not in terms direct the issuance of execution, since Rule 8 of the new equity rules makes all such decrees enforceable by execution."

The above decisions declare the law applicable to judgments in the State courts of Texas. We think also that they establish the general rule upon the subject, and certainly the rules applicable to judgments in the Federal Court of Texas. Equity, Rule 10, heretofore referred to, is a substantial re-enactment of former Rule 92, and in considering that rule the courts have held that—"the word 'may' is mandatory, and that the complainant is entitled to his deficiency judgment as a matter of right." N. W. Mutual Life Ins. Co. vs. Keith, 77 Fed. 374; 23 C. C. A. 196.

In Foster on Federal Practice, Vol. 2, page 1345, of the Fifth Edition, it is said that the rules provide that final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution in the form used in the District Courts in suits at common law in actions of assumpsit. The author in this connection further says that a decree for a deficiency is enforceable in the same manner.

SIXTH SPECIFICATION, BEING THE SIXTH ASSIGNMENT OF ERROR.

We do not agree with the contention that the order on the mandate had the effect of adding to or amending in any material respect the foreclosure decree, but the order was only to carry out the judgment of the lower court for $6804.90, with interest, less such amount as might be secured by a sale of the machinery, and

was for the purpose of compelling both principal and surety to pay the amounts for which they had bound themselves, and which they were seeking to evade. Courts have the right, not only to make their records speak the truth, but to enforce the decrees properly rendered in causes in said courts.

The record in this case shows unmistakably that the Court rendered a personal judgment in favor of the complainant, the Rathbun-Jones Engineering Company, and that it did not, as contended by the petitioners herein, grant to the complainant a judgment foreclosing its lien upon the property mentioned in the decree only. It will be conceded that the Court intended to render a judgment for complainants for the amount sued for; but counsel for the petitioners contend that because the Court inadvertently failed to include in the decree a direction that execution should issue for any deficiency that might arise over and above the amount for which the specific property mentioned in the decree should be sold, an execution for the deficiency could not issue. It will also be conceded that the order made by the Court on February 24, 1915, would be a perfectly valid and binding order if it had been made during the term at which the original judgment was rendered; but counsel for petitioners contend that this order was void because made after the expiration of that term. Our position is, as we have already stated, that a correction of the judgment so as to provide for an execution for the deficiency was not necessary, but if it should be held to be necessary, then we say that the Court had a right to order the issuance of proper process so as to provide for the enforcement of the judgment. Upon this point we desire to call the

Court's attention to a few adjudicated cases.

In the case of Insurance Co. vs. Boone, 95 U. S., 117; 24 L. Ed., 395, the Supreme Court of the United States says:

> "Courts always have jurisdiction over their records, to make them conform to what was actually done at the time; and, whatever may have been the rule announced in some of the old cases, the modern doctrine is that some orders and amendments may be made at a subsequent term."

In the case of Bernard vs. Abel, 156 Fed., 652, the United States Circuit Court of Appeals, after quoting with approval the quotation from the case of Insurance Co. vs. Boone, *supra,* said:

> "This power is one to make the records speak the truth. It is salutary and enables courts to prevent injustice through mere mistakes, or through inadvertence of the Judge, or counsel, or clerk. After the expiration of the term at which a judgment is rendered, there is no power in a court of law to amend a record in order to make it show that which did not take place, as to do this would be to exercise a revisory or appellate power of the court's own decisions; but, upon proper showing the power to correct a record by amending a judgment at a subsequent term is thoroughly well established." Citing Bank vs. Moss, 6 Howard 31; 12 L. Ed. 331; Odell vs. Renyolds, 70 Fed. 656, 17 C. C. A. 317.

In the case of Odell vs. Reynolds, 70 Fed. 656, 17 C. C. A. 317, it is held that: Judgments may be corrected after the end of the term—first, where the necessity for correction and the matter from which it is to be made appear upon the face of the record;

and, second, where justice requires a correction to be made for matters resting in the recollection of the Judge, or in the evidence *aliunde*. In the former case notice is not necessary; in the latter case it is necessary if it rests on evidence *aliunde*.

The case of Odell vs. Reynolds, *supra*, was decided by the United States Circuit Court of Appeals, composed of Judges Taft, Lurton, and Severens, and in the course of the opinion it was said:

> "In the present case counsel for the defendant submit as a vital objection to the action of the Illinois Court in making the entry for correction of February 26, 1893, that 'to make that finding, and insert it in the judgment *nunc pro tunc*, was to materially add to and substantially modify the judgment that was rendered at the prior term; for it involves the very character and scope of the agency to which alone Reynolds had committed the right to enter his appearance and confess judgment.' But the consequence of the correction is no test of the power of the Court to make it. In Wright's case, just cited, the effect of the entry was to annihilate the whole foundation on which his petition rested. In Emery vs. Whitwell it was held that when the files of the case clearly show that judgment for a definite sum should have been entered, and was intended by the Court to be entered, but the entry actually made was defective, it is entirely competent to amend the record to what it should have been, at any time thereafter. Sometimes the propriety of such action exists in cases where the correction may be made upon that which appears in the record itself, and is necessay to make it consistent and harmonious, one part with another. In other cases, it is necessary in the interests of justice to act upon matters not appearing from the record; for example, things resting in the recollection of the Judge, or evidence

adduced *aliunde*. In the former case, notice to the parties is not necessary. No new thing is brought upon the record. The court, for the clearer and more accurate expression of its final action molds into form that which is fairly and reasonably deducible from the whole record, taken together. There is nothing to litigate. No right is substantially affected. Freem. Judgm., Sec. 72a; 1 Black, Judgm., Sec. 164; Emery vs. Whitwell, *ubi supra;* Matheson's Adm'r vs. Grant, 2 How. 263."

To the same effect as the above case, see Groton Bridge Co. vs. Clark, 126 Fed. 552, where it is held that courts of record possess the power to correct or amend their records after the expiration of the term in order to make them speak the truth. See also *In re* Wright, 134 U. S. 136; 33 L. Ed. 856; and Bank vs. Wister, 3 Peters 431, 7 L. Ed. 731.

We also call attention to the authorities cited under the reply to the Fifth Specification, which show a clear right to the execution under the judgment, and the effect of the order on the mandate was a direction to the clerk to carry out the judgment as rendered.

APPELLANT'S SEVENTH SPECIFICATION, BEING THE SEVENTH ASSIGNMENT OF ERROR.

we have already replied to said specification in our reply to the fifth specification.

APPELLANT'S EIGHTH SPECIFICATION, BEING THE NINTH ASSIGNMENT OF ERROR.

We do not agree with counsel that the execution

against the appellant was void because of the certificate of dissolution filed by the People's Light Company.

We desire to call the Court's attention to Article 1206 of the Revised Statutes of Texas (Acts 1907, page 341), which reads as follows:

> "Upon the dissolution of any corporation, unless a receiver is appointed by some court of competent jurisdiction, the president and directors or managers of the affairs of the corporation at the time of its dissolution, by whatever name they may be known in law, shall be trustees of the creditors and stockholders of such corporation, with full power to settle the affairs, collect the outstanding debts, and divide the moneys and other property among the stockholders, after paying the debts due and owing by such corporation at the time of its dissolution, as far as such money and property will enable them after paying all just and reasonable expenses; and to this end and for that purpose, they may, in the name of such corporation, sell, convey, and transfer, all real and personal property belonging to such company, collect all debts, compromise controversies, maintain or defend judicial proceedings, and to exercise the full power and authority of said company over such assets and properties; *and the existence of every corporation may be continued for three years after its dissolution from whatever cause for the purpose of enabling those charged with the duty to settle upon its affairs;* and, in case a receiver is appointed by a court for this purpose, the existence of such corporation may be continued by the court so long as in its discretion it is necessary to suitably settle up the affairs of such corporation."

It will be noted that the statute above quoted pro-

vides that the trustees of dissolved corporations shall have authority in the name of the corporation to sell, convey and transfer real estate and personal property belonging to the company, collect all debts, compromise controversies, maintain or defend judicial proceedings, and exercise the full power and authority of the company over such assets and properties. The statute above quoted is, we think, ample authority for the proposition that execution may issue against the People's Light Company on account of the judgment recovered against that company, which was affirmed by this Court prior to the dissolution of the corporation. The statute provides that the Trustees may, in the name of the corporation, prosecute and defend suits, and this, we think, is in itself sufficient to authorize the execution in this case. But it contains a further provision that corporations may be continued for three years. In the motion of Eldridge shown on page 28 (Tr., 419), it is admitted that the board of directors were managing the affairs of the People's Light Company. It is true the statute uses the word "may" instead of "shall," but under well recognized rules of construction the word "may" as used in this statute will be construed to mean "shall." The general rule is that the word "may" in a statute will be construed to mean "shall" wherever the rights of the public or a third person depend upon the exercise of a power or the performance of a duty to which it refers.

Mays vs. Fearson, 50 U. S. 248; 13 L. R. A. 125;

People vs. Commissioners of Highways, 22 N. E. 596; 6 L. R. A. 161;

Municipality vs. Lehman, 57 Fed. 324; 6 C. C. A. 349;

Havemeyer vs. Superior Court of City and County of San Francisco, 24 Pac. 121; 10 L. R. A. 627.

The statutes often provide that the corporate existence of corporations shall continue for a fixed period after the dissolution so that suits may be brought by and against the corporation for the purpose of closing up its business and disposing of its assets.

McGloom vs. Scales, 9 Wal., 23.

The life of a corporation is frequently extended by these statutes for three years.

Herron vs. Vance, 17 Ind. 595;

Foster vs. Essex Bank, 16 Mass. 245;

Van Glahn vs. DeRossett, 81 N. C. 467.

See also to the same effect:

Dundee, etc., vs. Hughes, 77 Fed. 855.

It is true that in an old case in Texas known as Aldrich vs. Pardee, 60 S. W. 791, decided on June 30, 1900, that one of our Courts of Civil Appeals held that a sale under execution after a dissolution of a court was void. However, that decision was rendered under Article 682, Revised Civil Statutes 1895, which is now repealed but read as follows:

"Upon the dissolution of any corporation already

created by or under the laws of this State, unless a receiver is appointed by some court of competent authority, the president and directors or managers of the affairs of the corporation at the time of its dissolution, by whatever name they may be known in law, shall be trustees of the creditors and stockholders of such corporation, with full power to settle the affairs, collect the outstanding debts, and divide the moneys and other property among the stockholders, after paying the debts due and owing by such corporation at the time of its dissolution as far as such money and property will enable them; and for this purpose they may maintain or defend any judicial proceeding."

The court will note the clear distinction between the two statutes. Art. 682, just quoted, makes the president and directors, or managers, trustees of the creditors and stockholders, with power to settle the affairs, collect the debts, and divide the money and other property among the stockholders, after paying the debts due by the corporation at the time of its dissolution, and for this purpose maintain or defend any judicial proceedings.

The amended Article in 1907 above quoted, provides that all the acts shall be done in the name of the corporation. In other words, in the name of the corporation they sell, convey and transfer real and personal property; in the name of the corporation collect its debts; compromise controversies; maintain or defend judicial proceedings and exercise the full power of the corporation over its assets and property and the corporation is not dissolved by filing a certificate of dissolution, but its very existence is continued as a corporation for three (3) years thereafter, or longer, in

case of the appointment of a receiver.

In the case of Boyd vs. Hankinson, 92 Fed., p. 53, it was held that the right to an execution against a corporation existed after its dissolution under a statute similar to ours, which reads as follows:

> "Sec. 53. All corporations, whether they expire by their own limitation or be annulled by the legislature or otherwise dissolved, shall be continued bodies corporate for the purpose of prosecuting and defending suits by or against them, and of enabling them to settle and close their affairs, to dispose of and convey their property and to divide their capital, but not for the purpose of continuing the business for which they were established." Sess. Acts. N. J. 1896, p. 295.

It will appear from the foregoing that the execution was not void because issued after the People's Light Company filed its certificate of dissolution, which, as we have shown, was on January 27, 1915.

The execution issued herein was not void by reason of the fact that one of the sureties on the supersedeas bond was at the time of the issuance of such execution deceased.

However, the question of the issuance of an execution is not material to a proper decision of this case for it appears by the certificate of the Clerk of the United States District Court of the Southern District of Texas, that the balance of the judgment after the sale of the machinery was, on October 5, 1915, paid by Clark Pease "as trustee for himself, and the other stockholders of the People's Light Company, defendant in the above styled and numbered cause." (P. 89, Tr.

419). It seems from this certificate, that Clark Pease, who is appealing this case individually and previous to the sale of any property of his, as trustee for himself and the other stockholders of the People's Light Company, whose assets in the hands of the trustees were liable for the judgment, paid same in full to the Clerk of the United States District Court, and if the judgment was properly obtained and affirmed on appeal, the People's Light Company as well as the sureties were responsible for its payment and the appellant herein has no further interest therein. It seems to us too plain for argument that since the People's Light Company, defendant in the original cause of action, through Clark Pease, for himself and other stockholders, as shown in said petition, have paid to the Clerk, the judgment, there is nothing to litigate with reference to the right to the execution.

Independent of this, however, the fact that one of the sureties, to-wit, Gust. Heye, was deceased, did not in any way affect the validity of the execution as against the defendant People's Light Company and the remaining sureties on its supersedeas bond.

In the case of Stark vs. Carroll, 66 Tex. 393, 31 S. W. 198, decided by the Supreme Court of Texas, it is held that the objection that an execution was void because issued in part against a surety who was a deceased person could not be raised by other execution defendants; that the latter might look to the estate for contribution.

In the case of Boyse vs. Woods, et al., 37 Tex. 245, the Supreme Court held that even though one defendant in execution had died, the right existed for the holder

of the judgment to have execution issued against the other, and the right of contribution by the defendants could be asserted against the estate of deceased.

It is also held in the case of Chandler vs. Hudson, 11 Tex. 32, that where one of two judgment debtors is deceased, execution may run against the survivor without issuance as to the deceased.

In the case of Babbit vs. Shields, 11 Otto, pages 7 to 15; 101 U. S. 820, the Court stated:

> "Suppose it is so—still it is contended by the defendants that they were not liable in a suit on the bond because the plaintiff did not, as a preliminary proceeding, sue out an execution on the judgment and take proper steps to make the money. The condition of the bond is a sufficient answer to that defense, as it stipulates that if he, the principal, fails to make his plea good, the obligors (principal and sureties) shall answer for all damages and costs, which is quite enough to show that it was not necessary that an execution should be sued out on the judgment before a cause of action would accrue to the judgment creditors to enforce their remedy on the bond, as between the obligors and obligees all the obligors are principal debtors, though, as between each other, they may have the rights and remedies resulting from the relation of principal and surety."

It seems so clear to us that the execution in this case was not void as against the defendant People's Light Company and against Clark Pease, the surviving surety on the supersedeas bond, that we should not pursue this question further.

APPELLANT'S NINTH SPECIFICATION, BEING THE TENTH ASSIGNMENT OF ERROR.

Appellee has already replied to the question raised by this specification under the reply to the fifth and eighth specifications.

APPELLANT'S TENTH SPECIFICATION, BEING THE TENTH ASSIGNMENT OF ERROR.

Appellee has already replied to this specification under the reply to the eighth specification.

APPELLANT'S ELEVENTH SPECIFICATION, BEING THE FOURTEENTH ASSIGNMENT OF ERROR.

Appellee has already replied to the questions raised under this specification in the reply to the questions raised under the fifth specification.

CONCLUSION.

We have replied individually to the specifications raised by the appellant in this cause, and it seems to us that the case is one that should be affirmed by this Court.

The record shows that appellee secured a money judgment; that a supersedeas bond was executed and

that the judgment was affirmed by the Circuit Court of Appeals for the Fifth District; that the defendant in that litigation, the People's Light Company, sought to dissolve the corporation but the statutes of Texas keep the corporation alive for three years, so that the directors and managers may close up the business and pay all debts and distribute the assets of the corporation, and that in doing so they do not act as individuals but in the name of the corporation still in existence. An execution was properly issued against the principal and sureties for the deficiency after the sale of the machinery, secured by the lien; that Clark Pease, appellant herein, sought to prevent the issuance of execution, and on October 5th, 1915, appellant herein, "as Trustee for himself and the other stockholders of the People's Light Co.," paid to the Clerk of the Court the balance due on the judgment.

It seems to us that this case should be affirmed for the reasons above given; for the reason that there is nothing further about which to litigate; and for the reason that right and justice will be served by the entering of a decree affirming this cause.

Respectfully submitted,

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TERRELL & TERRELL,
Of Counsel.